Supreme Ct., U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

DANNY LEE JONES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The state post-conviction court denied Jones' claim that his counsel was ineffective in failing to (a) obtain a "non-neutral" mental health expert, (b) timely seek additional mental health testing, and (c) present additional evidence of Jones' allegedly abusive childhood, head trauma and drug abuse. Notwithstanding an evidentiary hearing in state court (by the same judge who sentenced Jones) and notwithstanding an additional evidentiary hearing in federal court that only yielded evidence that was either cumulative or not credible, the Ninth Circuit reversed the district court and granted habeas relief based on its finding that the state court ruling was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

1. Did the Ninth Circuit err in this AEDPA case by interpreting *Ake v. Oklahoma*, 470 U.S. 68 (1985), to require appointment of a "non-neutral" mental health expert to assist the defense at sentencing, even though there is no clearly established law from this Court evidencing such a requirement and there is a circuit split regarding this interpretation of *Ake*?

2. Did the Ninth Circuit err by failing to defer to the state court's resolution of Jones' ineffective assistance claims, when the state court properly applied the analysis required under *Strickland*, and when "new" evidence developed in federal court was cumulative and/or not credible?

a. Does defense counsel perform deficiently within the meaning of the first prong of *Strickland* by relying on the description of childhood abuse provided by the defendant and his mother and stepfather, and not additionally interviewing the defendant's sibling regarding the same type of abuse?

b. Does a federal court err by considering only newly proffered mitigation evidence, without considering rebuttal evidence and evidence of aggravating circumstances, in determining whether the additional mitigation evidence would have changed the sentencing decision?

3. Did the Ninth Circuit err by ruling that a district court, in considering ineffective assistance of counsel claims following an evidentiary hearing, should not evaluate the credibility of expert witnesses who testified at the hearing regarding evidence a petitioner claims should have been presented at sentencing?

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit's decision is set forth in *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009). Pet. App. A. The Ninth Circuit's unpublished order dated January 25, 2010, concluding *en banc* proceedings, is attached as Pet. App. B. The relevant district court decision is set forth in *Jones v. Schriro*, 450 F.Supp.2d 1023 (D. Ariz. 2006). Pet. App. C. The state post-conviction court's ruling denying Jones' petition for post-conviction relief is attached as Pet. App. D. The Arizona Supreme Court's opinion on direct review is set forth in *State v. Jones*, 917 P.2d 200 (Ariz. 1996). Pet. App. E.

STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on October 2, 2009. *En banc* proceedings concluded on January 25, 2010. Petitioners timely filed this petition for writ of certiorari within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

> law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In 1993, Danny Lee Jones was sentenced to death after a Mohave County, Arizona, jury convicted him of two counts of premeditated murder and one count of attempted premeditated murder. The facts underlying those crimes are set forth in the Arizona Supreme Court's opinion affirming Jones' convictions and death sentences:

> In February 1992, defendant moved to Bullhead City, Arizona, and resumed a friendship with Robert Weaver. At this time, Robert, his wife Jackie, and their 7-year-old daughter, Tisha, were living in Bullhead City with Robert's grandmother, Katherine Gumina. As of March 1992, defendant was unemployed and was planning to leave Bullhead City.

On the night of March 26, 1992, defendant and Robert were talking in the garage of Ms. Gumina's residence. Robert frequently entertained his friends in the garage, and during these times, he often discussed his gun collection. The two men were sitting on inverted buckets on the left side of the garage, and Ms. Gumina's car was parked on the right side of the garage. Both defendant and Robert had been drinking throughout the day and had used crystal methamphetamine either that day or the day before.

At approximately 8:00 p.m., Russell Dechert, a friend of Robert's, drove to the Gumina residence and took defendant and Robert to a local bar and to watch a nearby fire. Dechert then drove defendant and Robert back to the Gumina residence at approximately 8:20 p.m. and left, telling defendant and Robert that he would return to the Gumina residence around 9:00 p.m.

Although there is no clear evidence of the sequence of the homicides, the scenario posited to the jury was as follows. After Dechert left, defendant closed the garage door and struck Robert in the head at least three times with a baseball bat. Robert fell to the ground where he remained unconscious and bleeding for approximately 10 to 15

minutes. Defendant then entered the living room of the Gumina residence where Ms. Gumina was watching television and Tisha Weaver was coloring in a workbook. Defendant struck Ms. Gumina in the head at least once with the baseball bat, and she fell to the floor in the living room.

Tisha apparently witnessed the attack on Ms. Gumina, ran from the living room into the master bedroom, and hid under the bed. Defendant found Tisha and dragged her out from under the bed. During the struggle, Tisha pulled a black braided bracelet off defendant's wrist. Defendant then struck Tisha in the head at least once with the baseball bat, placed a pillow over her head, and suffocated her, or strangled her, or both.

Defendant next emptied a nearby gun cabinet containing Robert's gun collection, located the keys to Ms. Gumina's car, and loaded the guns and the bat into the car. At some point during this time, Robert regained consciousness, and, in an attempt to flee, moved between the garage door and Ms. Gumina's car, leaving a bloody hand print smeared across the length of the garage door and blood on the side of the car. Robert then climbed on top of a work bench on the

> east side of the garage, leaving blood along the east wall. Defendant struck Robert at least two additional times in the head with the baseball bat, and, as Robert fell to the ground, defendant struck him in the head at least once more.

State v. Jones, 917 P.2d 200, 206 (Ariz. 1996). After the murders, Jones, who was the subject of outstanding warrants, removed Robert Weaver's gun collection from the house and left for Las Vegas, Nevada, selling the guns for cab fare and living expenses. *Id.* at 207.

At trial, Jones testified that he killed Weaver in self-defense and struck Katherine Gumina reflexively when she startled him. He further testified that, while he was fighting with Weaver in Weaver's garage, Frank Sperlazzo, an acquaintance of Jones who was attempting to collect a drug debt from Weaver, entered the house and killed Tisha as he was stealing Weaver's guns. The jurors were unpersuaded by Jones' testimony and convicted him on all counts.

At the sentencing hearing, Jones' counsel presented testimony from Jones' step-father that Jones' biological father was abusive to Jones' mother while she was pregnant; during Jones' birth, his mother's heart stopped and forceps were used to deliver Jones; Jones experienced black-outs when he was four; he suffered bruising easily due to a calcium deficiency; Jones' first step-father verbally and physically abused Jones, his mother, and his step-sister; that Jones suffered numerous head injuries when he was 13, 15,

and 19 years old; Jones was treated for concussions and was hospitalized when he was in the Marines; Jones suffered a history of drug and alcohol use which began at 13; and Jones participated in a drug-treatment program at a facility in San Francisco, where he stayed for almost 2 years. *Jones*, 950 F. Supp. at 1026–27.

Jones also presented testimony from a court-appointed expert, Dr. Jack Potts, who evaluated Jones twice prior to sentencing. Dr. Potts testified that he was unaware of a fall that Jones' step-father reported, but he testified to an additional fall and head injury that Jones himself had reported. *Id.* at 1027. Dr. Potts then provided the trial court with seven factors he considered mitigating and deserving of a sentence less than death: Jones' chaotic and abusive childhood and its effect on his mental health and development, of which Dr. Potts offered detailed testimony; Jones' significant history of substance abuse; the likelihood Jones suffered from an attenuated form of bipolar disorder; Jones' history of multiple head traumas[1]; Jones' genetic loading for substance abuse, and affective disorder. Dr. Potts recommended additional testing that would "clearly assist in coming to a more definitive conclusion" regarding whether Jones suffered brain damage. The trial court denied this request, citing the lack of evidence of neurological deficits. *Id.*

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[1] Other than his alleged head injury at age 19 in the Marine Corps, Jones did not present any documentation proving his alleged head injuries, either in state court or in district court.

Jones sought post-conviction relief in state court alleging that his Sixth Amendment right to counsel was denied based on trial counsel's ineffectiveness at sentencing for failing to (1) obtain a defense expert; (2) timely seek neurological or neuropsychological testing, and (3) present additional evidence of Jones' abusive childhood, head trauma and drug abuse. After conducting an evidentiary hearing on the second two claims, the trial court (the same judge who had sentenced Jones to death) denied relief. *See Jones*, 450 F. Supp. at 1029. The state court found that Dr. Potts provided necessary testimony regarding Jones' mental health issues, and that any additional witnesses testifying regarding Jones' childhood and upbringing would have been cumulative. *Id.* at 1029–30.

After the Arizona Supreme Court denied review of the trial court's post-conviction ruling, Jones initiated federal habeas proceedings in which he pursued several claims, including Claims 20(O), (P) and (T), which correspond to the three post-conviction claims detailed above. The district court granted an evidentiary hearing on these three claims even though the state court conducted an evidentiary hearing on Claims 20(P) and (T). Jones presented additional expert testimony in federal court based on neuropsychological testing suggesting that he suffered cognitive disorder or impairment, post-traumatic stress disorder (PTSD), attention deficit hyperactivity disorder (ADHD), and a mood disorder. The State presented expert testimony indicating that the test results and the record did not support diagnoses of cognitive disorder, PTSD, or a mood disorder. The district court denied relief, finding that Jones failed to

present persuasive evidence of the existence or cause of his alleged cognitive impairment:

> The experts ascribed as the primary cause of [Jones'] cognitive impairment a series of head injuries. With the exception of the 1983 "mugging," there is no medical documentation to corroborate any of these injuries. In addition, the dates and details--and even the occurrence--of the injuries, as reported by [Jones] and his family, are inconsistent and hence difficult to credit.
>
> . . .
>
> In any event, even if [Jones'] self-reported head injuries did occur, they did not, as discussed above, result in cognitive impairment.

Jones, 450 F. Supp.2d at 1039.

The district court found that Jones failed to "affirmatively prove prejudice" with regard to his ineffective assistance claims. *Id.* at 1040 (citing *Strickland*, 466 U.S. at 693). Regarding Claim 20(O) (failure to obtain a partisan expert), the district court found that the state court's application of *Strickland* was reasonable because Dr. Potts was a *de facto* defense expert at sentencing, and the subsequent mental-health evidence developed in district court did not establish a more persuasive case in mitigation. *Id.* at 1034, 1043. The district court pointed to Jones' trial counsel's testimony at the evidentiary hearing that Dr.

Potts "actively assisted developing mitigation, planning strategy" and that, after speaking with Dr. Potts and reviewing his report, trial counsel came to regard Dr. Potts as a mitigation expert and a member of the defense team. *Id.* The district court further noted that Dr. Potts' findings and testimony were "clearly favorable" to Jones and that, even with the benefit of additional evidence presented in federal court, Dr. Potts' findings regarding possible neurological damage caused by head trauma or other factors "remains the most persuasive statement in the record that neurological damage constituted a mitigating factor." *Id.* at 1044.

Regarding claim 20(P) (failure to timely seek neurological testing), the district court likewise found the state court's denial was not an unreasonable application of *Strickland*. The court found that Jones did not prove prejudice because his newly-developed evidence did not show that neurological testing would have established that Jones suffered cognitive impairment. The district court noted that, notwithstanding an opportunity to develop this type of evidence in an evidentiary hearing, Jones presented no evidence that neurological tests such as a CAT scan, MRI, or EEG had been performed, let alone that their results would support a finding of impairment. *Id.* at 1044. The district court found that Jones failed to prove prejudice because the testing he presented in district court was largely inconclusive and ambiguous and did not demonstrate that Jones suffered any cognitive impairment. *Id.* at 1044–45.

Addressing claim 20(T) (alleged failure to present additional evidence), the district court held that Jones failed to provide testimony from additional mitigation witnesses at the federal evidentiary hearing, with the exception of an affidavit from his sister alleging abuse by Randy Jones. The district court found that trial counsel did not perform deficiently because he was not on notice of the additional information of sexual abuse by Jones' grandfather presented through testimony from experts—Jones and his family did not provide this information until nearly 10 years after Jones was sentenced. The court also found that Jones' new allegations of sexual and physical abuse would have been viewed with skepticism by the trial judge given their late disclosure, inconsistency with other information in the record, and Jones' obvious motive to fabricate. *Id*, at 1047 (citing *State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996)).

On appeal, the Ninth Circuit rejected the district court's resolution of Claim 20(O) on the basis that, under Ninth Circuit authority interpreting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), "evaluation by a 'neutral' court psychiatrist does not satisfy due process." *Jones*, 583 F.3d at 639 (citing *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990)).

The Ninth Circuit similarly rejected the district court's findings regarding the other two claims and ignored the contradictory evidence offered by the State during the evidentiary hearing in district court, instead accepting at face value all of Jones' newly-proffered mitigation evidence. The panel chastised the

district court for weighing the inconsistencies in the experts' opinions in determining whether Jones proved prejudice under the *Strickland* analysis. *Jones*, 583 F.3d at 641. In addition, the panel found that the district court's assessment that Dr. Potts was a "de facto" defense expert was clearly erroneous. *Id.* at 639.

The Ninth Circuit granted the writ based on Jones' ineffective-assistance claims, relying heavily on *Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008)—a case this Court subsequently reversed in *Wong v. Belmontes*, 130 S. Ct. 383 (2009)—as well as on the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, and on two pre-AEDPA cases—*Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2005), and *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008).

The Ninth Circuit asked the parties to brief whether the court should consider *en banc* review. The court denied, however, the State's request for rehearing *en banc*.

Although there is not a panel or *en banc* dissent in this case, Chief Judge Alex Kozinski, in authoring a dissenting opinion in *Pinholster v. Woodford*, 590 F.3d 651, 685 (9th Cir. 2009), specifically referenced the instant case, together with another Ninth Circuit case from Arizona, *Libberton v. Ryan*, 583 F.3d 1147 (Cir. 2009), and several other cases, as examples of "a series of mistakes that have unfortunately, become far too common in our circuit." Noting the Ninth Circuit's reliance on evidence never presented to the state courts and "perhaps worst of all" a failure to afford deference

to state court rulings, Chief Judge Kozinski stated that the Ninth Circuit has "perpetuate[d] a habeas regime where few death sentences are safe from federal judges who know ever so much better than those ignorant state judges and lawyers how capital trials ought to be conducted." *Pinholster*, 490 F.3d at 685.

REASONS FOR GRANTING THE WRIT

The ruling below continues a practice in which death sentences are routinely set aside in the Ninth Circuit notwithstanding reasoned state-court decisions that properly apply controlling authority from this Court. To set aside Jones' death sentence, the Ninth Circuit created several novel rules, none of which are "clearly established" by this Court's precedents, as required for habeas relief under AEDPA. First, the court created a new "no neutral expert" extension of *Ake*; second, the court held that defense counsel must interview at least one sibling in preparation for the mitigation case, even if the defendant and the defendant's mother and stepfather willingly speak with counsel about alleged childhood abuse; and third, the court held that district courts may not make credibility determinations after considering expert testimony from both sides in an evidentiary hearing regarding evidence that allegedly should have been presented in state court. None of these new rules is a proper basis for relief. Furthermore, in analyzing Jones' ineffective assistance claims, the Ninth Circuit simply accepted at face value all of Jones' assertions without considering contrary evidence and without considering how Jones' newly-proffered mitigation would be weighed by the sentencer. Once again, therefore, the Ninth Circuit

has thwarted Congress' effort to limit federal courts' superintendence over state court criminal law rulings.

I

THE NINTH CIRCUIT IMPROPERLY READ A NEW REQUIREMENT INTO THIS COURT'S RULING IN *AKE V. OKLAHOMA*.

Because Jones filed his petition for writ of habeas corpus after April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under AEDPA, a state prisoner is not entitled to federal habeas relief with respect to any federal claim that was adjudicated on the merits in state court proceedings unless the state court adjudication (1) was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by this Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d).

In Claims 20(O) and (P) of Jones' amended petition for writ of habeas corpus, he alleged that trial counsel should have obtained funding for an additional "partisan" mental-health expert, and should have requested neurological and neuropsychological testing. At sentencing, Jones presented mental-health expert testimony through Dr. Potts, the court-appointed expert. Dr. Potts reviewed Jones' family history and medical records, and evaluated Jones prior to

sentencing. Dr. Potts testified regarding Jones' head injuries, abusive and chaotic childhood, and his history of drug abuse. In addition, Dr. Potts identified seven mitigating factors for the trial court to consider. Although Dr. Potts recommended that Jones obtain "sophisticated neurological testing" such as a CAT Scan or EEG, the trial court rejected counsel's request for additional testing as untimely. On post-conviction review, the state court rejected Jones's ineffective assistance claims relating to mental health experts, finding that Dr. Potts provided the needed consultation and testimony regarding mental health issues.

On federal collateral review, the district court granted an evidentiary hearing to allow Jones to further develop his allegations that neurological defects should have been explored. At the hearing, however, Jones did not present any neurological test results. Jones instead presented testimony from three mental health experts who only posited that Jones suffered from PTSD, mood disorder, and ADHD. The State presented testimony from three experts who disagreed that Jones suffered from PTSD and testified there was no link between any mental-health condition and Jones' conduct at the time of the murders. The district court found the State's experts to be more credible than those offered by Jones. The district court further found that Jones' "new" evidence was largely inconclusive or cumulative, and did not alter the sentencing profile presented in state court. *Jones*, 450 F. Supp. at 1043.

Notwithstanding that ruling, the Ninth Circuit granted relief, based in part on its view that the state

court ruling "was contrary to clearly established Supreme court precedent" as set forth in *Ake*. *Jones*, 583 F.3d at 638. In reaching this conclusion, the Ninth Circuit noted that *Ake* requires "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* (citing *Ake*, 470 U.S. at 83). The Ninth Circuit extended the reach of *Ake*, however, by relying on its own decision in *Smith*, 914 F.2d at 1158, for the additional proposition that, "under *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process." *Jones*, 583 F.3d at 638.

The Ninth Circuit's decision in *Smith* does not constitute "clearly established Federal law as determined by this Court." Accordingly, the Ninth Circuit's reliance on that decision on federal collateral review should be rejected under 28 U.S.C. § 2254(d)(1).

Other circuits have interpreted *Ake* differently than the Ninth Circuit. For example, in *Woodward v. Epps*, the Fifth Circuit expressly rejected an argument that a court-ordered evaluation by a "neutral" expert did not satisfy *Ake*:

> Availability of a neutral expert provides defendants with "the raw materials integral to the building of an effective defense." *Ake*, 105 S. Ct. at 1093. The state is not required to permit defendants to shop around for a favorable expert . . .. He has no right to the appointment of a psychiatrist who will reach biased or only favorable conclusions.

580 F.3d 318, 331–32 (5th Cir. 2009) (quoting *Granviel v. Lynaugh*, 881 F.2d 185, 191 (5th Cir. 1989)).[2] *See also Smith v. Mitchell*, 348 F.3d 177, 208 (6th Cir. 2003) (holding that *Ake* does not entitle a defendant to an independent psychiatrist of his choosing, only a competent psychiatrist). *But see Starr v. Lockhart*, 23 F.3d 1280, 1290–91 (8th Cir. 1994) (finding that *Ake* "expressly disavows" the theory that due process is satisfied by the appointment of a neutral expert).

Given this conflict in how *Ake* should be interpreted, and given the absence of clearly established law from this Court regarding this issue, the Ninth Circuit violated the precepts of AEDPA by finding that the state court ruling was contrary to *Ake*. *See Carey v. Musladin*, 549 U.S. 70, 76 (2006) (reflecting the lack of guidance from this Court regarding spectator conduct claims, lower courts have diverged widely in their treatment of the issue); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonabl[y]

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[2] In *Granviel*, after the Fifth Circuit ruled that there is no right to a non-neutral expert, this Court denied certiorari review. *See Granviel v. Texas*, 495 U.S. 963 (1990). Although the denial of certiorari review carries no precedential value, *see Teague v. Lane*, 489 U.S. 288, 296 (1989), it suggests that the underlying decision in *Granviel* was not contrary to Supreme Court authority, particularly given a dissent from the denial of certiorari by Justices Marshall and Brennan, in which they argued that providing a "disinterested" expert "does not satisfy *Ake*." *Granviel*, 495 U.S. at 965 (Marshall, J., dissenting).

appli[ed] clearly established Federal law.") (quotations omitted).

Furthermore, even assuming *Ake* requires something more than appointment of a neutral expert, in the instant case, defense counsel testified during the evidentiary hearing in federal court that he worked closely with Dr. Potts and viewed him to be a member of the defense team. *Jones*, 450 F. Supp. at 1043. Favorable testimony from a "neutral" expert is arguably more persuasive than similar testimony from an expert paid by a party. Thus, it is illogical to conclude that *Ake* requires testimony from a "non-neutral" expert when a "neutral" expert has become a *de facto* member of the defense team.

Regardless, there is no clearly established law from this Court holding that appointment of a neutral expert who works closely with the defense team does not suffice under *Ake*. Thus, the Ninth Circuit's ruling violates AEDPA's mandate that state court convictions and sentences be upheld absent clearly established authority to the contrary from this Court.

II

THE NINTH CIRCUIT'S OPINION FAILS TO FOLLOW THE CORNERSTONE AEDPA REFORM REQUIRING DEFERENCE TO STATE-COURT RULINGS.

AEDPA creates a "highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at

334 n.7. The federal court's opinion of the merits of a claim raised in a federal habeas petition is not the question. *Woodford v. Visciotti*, 537 U.S. 19, 24–25 (2007); *Yarborough v. Alvarado*, 541 U.S. 542, 665 (2002). Rather, "the only question that matters" under Section 2254(d) is whether the state-court ruling was at least "reasonable" under this Court's clearly-established law. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

In analyzing claims of ineffective assistance on federal collateral review, state court rulings are entitled to a double layer of deference under AEDPA: first, the substantial deference to which lawyers are entitled under *Strickland* in making judgments during the course of their representation; and second, the deference to which the state court is entitled in determining whether the lawyers' performance was ineffective *and* prejudicial. *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009).

The Ninth Circuit did not apply this deferential standard in evaluating the state court's resolution of Jones' post-conviction claims. The state court undertook the analysis required by *Strickland* and reasonably concluded that the additional evidence Jones proffered would not have changed the sentencing decision. Thus, the state court ruling was reasonable under Section 2254(d).

A. THERE IS NO CLEARLY ESTABLISHED LAW FROM THIS COURT REQUIRING THAT EVERY FAMILY MEMBER BE INTERVIEWED AS PART OF A MITIGATION INVESTIGATION WHEN THE DEFENDANT AND HIS PARENTS COOPERATE WITH DEFENSE COUNSEL AND PROVIDE INFORMATION REGARDING HIS BACKGROUND.

In Claim 20(T), Jones alleged that his trial counsel was ineffective for failing to present additional lay witnesses and evidence to bolster his mitigation case. Specifically, Jones claimed that counsel should have presented evidence from Jones' ex-wife, family members, friends, and former drug counselors.

At sentencing, trial counsel presented testimony through Randy Jones, Jones' second step-father, regarding Jones' abusive childhood, difficult childbirth, drug and alcohol abuse and drug treatment history, including his introduction to drugs by his grandfather, school history, history of head injuries, and the apparent effect of the drugs and head injuries on his behavior. In his state post-conviction relief proceeding, Jones presented additional testimony from his mother, Peggy Jones, regarding the abuse that she and Jones suffered at the hands of Jones' father and first step-father. The state court found this evidence redundant to what was presented at sentencing and concluded that Jones failed to meet his burden of proving that trial counsel performed deficiently.

In federal court, notwithstanding an opportunity to present additional testimony, Jones failed to present any lay witnesses to provide additional mitigation evidence. His "new" allegations were presented

primarily through expert reports detailing assertions that Jones was physically abused by Randy Jones, and sexually abused by his step-grandfather. Jones also presented an affidavit from his sister, Carrie Haigney, who avowed that her step father (1) threatened to kill himself, (2) was physically and verbally abusive to Jones, and (3) abused their mother so severely that Jones' threatened to kill him if he did not stop the abuse. Jones did not raise these allegations until 10 years after sentencing even though he and his family were presumably aware of them prior to sentencing. The district court concluded that this new evidence was unpersuasive—particularly because Jones and his family members never told trial counsel about this alleged abuse—and did not significantly change the analysis of the ineffective-assistance claim resolved by the state court.

The Ninth Circuit rejected that conclusion, finding that "[t]his information was not hidden for ten years because the family was uncooperative; it was hidden because the defense lawyer never asked the question." *Jones*, 583 F. 3d. at 645. The Ninth Circuit further held that "[t]he defense lawyer was aware that [Petitioner's] childhood abuse was perhaps the greatest mitigating evidence available, and he therefore had no justifiable excuse not to interview [Petitioner's] sister." *Id.*

Again, the Ninth Circuit has created a new requirement that has never been imposed by this Court – that a defense attorney who has interviewed a defendant and his mother, who both have knowledge of alleged abuse – is nevertheless incompetent unless he

interviews other family members like a sibling. Under this approach, a defense attorney will inevitably be found to have rendered deficient performance, because there is always at least one additional relative or friend who might have been interviewed and who might have turned up additional information.

B. THE NINTH CIRCUIT FAILED TO CONSIDER REBUTTAL EVIDENCE AND AGGRAVATING CIRCUMSTANCES, AND INSTEAD ENGAGED IN *DE NOVO* REVIEW.

In analyzing the reasonableness of the state court's post-conviction ruling, the Ninth Circuit failed to consider all the relevant evidence the sentencer would have considered, including rebuttal evidence and "the entire body of aggravating evidence." *Wong v. Belmontes*, 130 S. Ct. 383, 386 (2009); *see also Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (reversing Sixth Circuit decision and holding that cumulative evidence of difficult childhood did not warrant relief). Here, the state court found that Jones committed multiple murders in a cruel, heinous, and depraved manner, and for pecuniary gain.[3] In addition, the State proved an additional aggravating factor for the murder of 7-year-old Tisha Weaver, who hid under a bed after witnessing Jones beat her grandmother. The Ninth Circuit failed to weigh any of the rebuttal evidence or the aggravating factors in analyzing whether Jones could prove prejudice. Given the aggravation findings in this case, there is no reasonable probability that

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[3] The overwhelming evidence of aggravating factors is detailed in *Jones*, 917 P.2d at 206–07.

additional, relatively insubstantial mitigation would have changed the sentence.

Furthermore, although the Ninth Circuit acknowledged the AEDPA deference standard, the court made no effort to apply it because, in its view, the state court did not address the prejudice prong of the *Strickland* analysis, and thus federal review of that issue is *de novo*. *Jones*, 583 F.3d at 641. However, the state court, in analyzing Jones post-conviction claims, ruled that "the report and testimony of Dr. Potts, who was appointed by the court, adequately addressed defendant's mental health issues at sentencing." *Jones*, 450 F. Supp. at 1029. The state court also ruled that "the additional witnesses and evidence suggested by petitioner would have been redundant." *Id.* at 1029–30. These rulings address the prejudice prong of *Strickland* and this Court should not countenance an end run around AEDPA deference by allowing the Ninth Circuit to mischaracterize the state court ruling.

Notwithstanding opportunities in both state and federal court to develop evidence that should have been presented at sentencing, the record shows only that Jones' trial counsel could have presented additional evidence that was either cumulative or unreliable. [4] Accordingly, the Ninth Circuit violated

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[4]The fact that the district court granted an evidentiary hearing does not change the analysis of the reasonableness of the state court's post-conviction ruling. In fact, because Jones developed only cumulative and/or unpersuasive "new" evidence in federal court, the federal court evidentiary hearing confirms the reasonableness of the state court ruling. *See Knowles*, 129 S. Ct.
(Continued)

AEDPA's mandate requiring deference to the state court's resolution of Jones' post-conviction claims, particularly given the fact that the post-conviction decision was made by the same judge who sentenced Jones and who was uniquely qualified to assess the prejudice prong of the *Strickland* analysis. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) (noting that post-conviction judge was "ideally situated" to evaluate ineffective assistance claim because she had also been the judge who imposed sentence).

In his dissenting opinion in *Pinholster*, Chief Judge Kozinski's description of the Ninth Circuit's flawed review of ineffective-assistance-of-counsel claims in this and other cases is particularly apt and highlights the need for corrective action by this Court:

> The majority reaches the contrary conclusion [that the habeas petitioner is entitled to relief on a claim of ineffective assistance] through a series of mistakes that have, unfortunately, become far too common in our circuit. First, the majority relies on evidence never presented to the state courts and that we may therefore not consider in federal habeas proceedings governed by AEDPA. *Contra Williams v. Taylor* (*Michael Williams*), 529 U.S. 420, 437-40, 120 S. Ct. 1479, 146 L.Ed.2d 435 (2000). Second, the majority applies

(Continued)

at 1420.

retrospectively a standard for counsel's performance that bears no relationship to that prevailing at the time of Pinholster's trial in 1984. *Contra Bobby v. Van Hook*, ___ U.S. ___, 130 S. Ct. 13, 18-19 (2009) (per curiam). Third, and perhaps worst of all, the majority accords no deference to the California Supreme Court's superior expertise in determining what constitutes competent representation among the members of its bar and the likely consequences (or lack thereof) of any deficient performance. *Contra Schriro v. Landrigan*, 550 U.S. 465, 473-74, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

Few state court judgments can withstand even one such error, *see, e.g.*, *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009); *Gilley v. Morrow*, 246 Ved. Appx. 519 (9th Cir. 2007) (unpublished); *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2004); see also cases cited pp. 692, 711 infra, but in combination they are deadly. I had hoped that our en banc court would sweep away these mistakes and bring our caselaw into conformity with AEDPA. Instead, the majority repeats and magnifies the errors in these prior cases so that they will be very difficult, probably impossible, for us to correct. This perpetuates a habeas regime where few death sentences are

> safe from federal judges who know ever so much better than those ignorant state judges and lawyers how capital trials ought to be conducted. Because I don't believe we are the ultimate font of wisdom on such matters, I must dissent.

590 F.3d at 685. *See also Robinson v. Schriro*, 595 F.3d 1068, 1117 (9th Cir. 2010) (Rawlinson, J., dissenting) (noting the Ninth Circuit's failure to properly apply the prejudice analysis required under *Van Hook* and *Belmontes*). This Court should grant certiorari review to change the Ninth Circuit's errant analysis and mandate proper deference to reasoned state-court decisions.

III

THE NINTH CIRCUIT IMPROPERLY HELD THAT DISTRICT COURTS MAY NOT MAKE CREDIBILITY DETERMINATIONS WHEN ASSESSING EXPERTS' TESTIMONY PRESENTED AT FEDERAL COURT EVIDENTIARY HEARINGS REGARDING *STRICKLAND* CLAIMS.

Not only did the Ninth Circuit fail to defer to the state court's analysis of Jones' ineffective assistance claims, it also failed to defer to factual findings made by the federal district court following an evidentiary hearing. In overturning the district court ruling, the Ninth Circuit chastised the district court for weighing

competing testimony from experts for both sides who evaluated Jones and who testified in the federal evidentiary hearing. *Jones*, 583 F.3d at 641. The Ninth Circuit held that the district court should not have independently evaluated the testimony of the experts in determining which expert was believable, and instead should only have decided "whether there existed a 'reasonable probability' that 'an objective factfinder' in a state sentencing hearing would have concluded, based on the evidence presented, that [the defendant] had a brain injury that impaired his judgment at the time of the crime." *Id.* (quoting *Correll v. Ryan*, 539 F.3d 938, 952 (9th Cir. 2008)). The Ninth Circuit did not explain, however, how an assessment can be made regarding a reasonable probability that proffered evidence would have changed the factfinder's decision in state court *without* evaluating the evidence's credibility. *Cf. Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (explaining the value of cross-examination in assessing "inconsistent" psychiatric evidence).

Without considering the district court's assessment of the credibility of Jones' experts, the Ninth Circuit simply noted that Jones presented experts who testified about his "extensive history of physical, mental, and sexual abuse, numerous head injuries resulting in unconsciousness, and a lifetime of substance abuse." *Jones*, 583 F.3d at 643. The Ninth Circuit accepted as true the testimony from Jones' experts, and ignored the contrary evidence presented by the State's experts. The Ninth Circuit thus concluded that Jones had established a "persuasive" case that he suffered serious mental defects, was

abused throughout his childhood, and became a substance abuser to self-medicate for the trauma he experienced. *Id*

Under the Ninth Circuit's approach, there is no reason for an evidentiary hearing in district court. A petitioner would be entitled to simply submit affidavits and the federal courts would be required to take them at face value without attempting to assess the credibility of the proffered evidence. Such an approach is illogical and conflicts with this Court's pronouncement that "courts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous." *Knowles*, 129 S. Ct. at 1421 (citing Federal Rule of Civil Procedure 52(a)). In *Knowles*, this Court accepted certiorari review and reversed a Ninth Circuit decision that had granted federal habeas relief on an ineffective-assistance-of-counsel claim notwithstanding factual findings by a magistrate judge contrary to the conclusion reached by the Ninth Circuit. *Id.* This Court should similarly grant certiorari review in the instant case to confirm that factual findings by a district court following an evidentiary hearing are relevant and appropriate.

CONCLUSION

For the above reasons, this Court should grant certiorari review.

Respectfully submitted

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APPENDICES

United States Court of Appeals,
Ninth Circuit.
Danny Lee JONES, Petitioner-Appellant,
v.
Charles L. RYAN,[FN*] Respondent-Appellee.

FN* Charles L. Ryan is substituted for his predecessor Dora B. Schriro as Director of the Arizona Department of Corrections. Fed. R.App. P. 43(c)(2).

No. 07-99000.

Argued June 11, 2009.
Submitted July 6, 2009.
Filed Oct. 2, 2009.

Terry Goddard, Arizona Attorney General, Kent E. Cattani, Chief Counsel, Capital Litigation Section, and Jeffrey A. Zick, Assistant Attorney General, Phoenix, AZ, for the respondents-appellees.

Jon M. Sands, Federal Public Defender, Leticia Marquez, Assistant Public Defender, and Sylvia J. Lett, Assistant Public Defender, Tucson, AZ, for the petitioner-appellant.

Appeal from the United States District Court for the District of Arizona, Susan R. Bolton, District Judge, Presiding. D.C. No. CV-01-00384-SRB.

Before B. FLETCHER, MICHAEL DALY HAWKINS and SIDNEY R. THOMAS, Circuit Judges.

THOMAS, Circuit Judge:

Danny Lee Jones, an Arizona inmate on Death Row,

appeals the district court's denial of his petition for writ of habeas corpus. We conclude that Danny was denied constitutionally effective assistance of counsel at sentencing, and we reverse the judgment of the district court.

I

A

On March 26, 1992, Danny Jones spent the day partying in Richard Weaver's garage in Bullhead City, Arizona, when a fight broke out. Evidence at trial indicated that Danny hit Weaver over the head multiple times with a wooden baseball bat, killing him. Danny then went into the house where he encountered Weaver's grandmother, Katherine Gumina. Danny struck Gumina in the head with the bat and knocked her to the ground. Danny then made his way to Weaver's bedroom where he found Tisha Weaver, Weaver's seven-year-old daughter, hiding under her parents' bed. Evidence showed that Tisha was hit in the head with the bat, and either strangled or suffocated with a pillow. Danny was arrested in Las Vegas, Nevada, and he was indicted in Arizona on two counts of murder in the first degree, and one count of attempted murder.[FN1]

> FN1. Gumina initially survived the attack and was in a coma for 17 months before eventually dying from her injuries. The prosecution never amended the indictment after Gumina died.

B

A public defender in the Mojave County Public Defender's Office was assigned Danny's case. At the

time, the defense lawyer had been an attorney for little more than three years, and he had never been lead attorney on a capital case. The defense lawyer requested $5,000 from the trial court for expert witnesses. The court authorized $2,000.[FN2] The defense lawyer split that money between a crime scene investigator and an addictionologist.

> FN2. The trial judge granted the $2,000 during a March 17, 1993, status conference and stated:
>
> > If this is all you need pretrial, you may need more at trial, and then of course the sentencing hearing if we get that far, so-but, I am willing to go $2,000 prior to trial, and then with the understanding that I am willing to listen again if you need more.

The jury convicted Danny on all counts. Judge James Chavez scheduled the sentencing hearing for three months later. The defense lawyer subsequently took his first trip to Reno, Nevada, in order to interview Danny's mother, Peggy Jones, and step-father, Randy Jones, to investigate possible mitigation defenses.

The defense lawyer presented testimony from two independent witnesses at sentencing: investigator Austin Cooper, and Randy Jones. Cooper testified entirely about evidence he found regarding an alleged accomplice. Randy explained that he married Peggy Jones when Danny was eight years old, and that much of his testimony was based on second hand conversations with Peggy. Randy explained that Peggy gave birth to Danny when she was only 15 years old and had numerous complications during

the pregnancy and delivery. Randy testified that Danny suffered multiple head injuries when he was growing up, and that when Danny was 13 or 14 years old his personality began to drastically change. Danny started lying, cutting classes at school, drinking, and doing drugs. Danny's step-grandfather introduced him to marijuana when he was around 10 years old, and he was an alcoholic by the time he was 17.

The trial court appointed Dr. Jack Potts to examine Danny and provide a report to the court. The defense lawyer called Dr. Potts to testify at sentencing. Dr. Potts stated that in conducting his review he spent four hours interviewing Danny in prison, 1.5 of which were spent administering a personality test. He also spoke to Danny for "a couple of hours" the day before testifying. He interviewed Peggy by phone for 30 minutes, and he spoke to Randy for one hour the day before testifying. During Dr. Potts' testimony the following colloquy took place:

> Q. Do you feel you have been provided with adequate data, coupled with your in-person examination of the defendant, to make a conclusion for mitigating findings that you did?
>
> A. .... I believe everything I reviewed and what I have heard about the case and reviewed with the defendant, his comments to me. I would have liked, and I think I have-I think it would be valuable to have had some neurologic evaluations, not-by a neurologist, clinical exam, such as a CAT scan, possibly an MRI, possibly EEG, possibly some sophisticated neurological testing, because I think there's very strong evidence that we have ..., I believe, of traumatic brain injury, and there's some

other evidence that I believe we may have organic neurologic dysfunctions here that has gone on since he's been about 13. So, there's some other testing that I think would be valuable to have to pin down the diagnosis....

Q. And you think that further testing might shed some additional light on, perhaps, some of these factors you listed and maybe why Mr. Jones behaves in the way he did on March 26, 1992?

A. Yes. I think it could help in clarifying and giving us etiology as the behavioral components, the explosive outbursts, the aggression, the mood changes, and the changes that occurred in his personality as noted by his mother when he was about 13, 14 years old.

Q. In your opinion, could that information possibly provide ... a significant mitigating factor as to what would be relevant to the issues at this hearing?

A. Clearly I think it would be corroborative of my clinical impressions and my diagnostic impressions in my report.

Dr. Potts discussed the fact that Danny's first step-father physically and verbally abused Danny, and stated that it was "unequivocal" that Danny carried that abuse with him into his adult life. Dr. Potts also stated that given the long history of substance abuse and other psychological problems in Danny's family, Danny was predisposed for substance abuse or a possible affective disorder. Dr. Potts did not, however, give a specific diagnosis, but stated: "I think ... to a reasonable degree of medical certainty that the defendant suffers from a psychothymic

disorder, which is a mood disorder, possibly organic syndrome, secondary to the multiple cerebral trauma that he's had as well as the prolonged substance abuse."

Dr. Potts testified that the drugs and alcohol Danny had on the day of the murders would have had a significant effect on Danny because "it's real clear that the brain is much more susceptible when it's been injured by drugs. Furthermore, when you're on drugs, you are more susceptible to the acts of aggression under amphetamines." He further stated: "I believe in my experience in cases like this, is that had it not been for the intoxication, the alleged offense would not have occurred."

Dr. Potts also submitted a six-page report to the court. The report includes: approximately two pages describing Danny's social development and history, including his medical history, one page of analysis, and one page of recommendations. Dr. Potts concluded that "Mr. Jones' capacity to conform his conduct to that of the law was clearly impaired at the time of the offenses...." He therefore recommended that an aggravated sentence should not be imposed. After Dr. Potts testified, the defense lawyer moved for a continuance so an expert could conduct psychological testing. The defense lawyer stated: "It's not a delay tactic ... [I]t's not something I planned on doing until ... very recently after the report was done, after talking with Dr. Potts, after exploring all these issues." The district judge considered and rejected the motion:

> THE COURT:.... I also know that there were funds made available to the defense at some point and you used them to hire [an addictionologist].... [I]f

> there were any follow-up questions of a psychological or neurological nature, I would think that the defense would have followed them up.
>
> COUNSEL: But, Your Honor, respectfully, ... I didn't realize this issue was that important until Dr. Potts brought it up or I would have certainly asked for the funds earlier.

The judge found the following aggravating factors for Weaver's murder: (1) Danny "committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value"; (2) Danny "committed the offenses in an especially heinous or depraved manner"; and (3) Danny was "convicted of one or more other homicides ... which were committed during the commission of the offense."

The judge found four non-statutory mitigating factors: (1) Danny suffered from long-term substance abuse; (2) he was under the influence of drugs and alcohol at the time of the offense; (3) he had a chaotic and abusive childhood; and (4) his longstanding substance abuse problem may have been caused by genetic factors and aggravated by head trauma. The judge found the same aggravating and mitigating circumstances for Tisha's murder, but he also found that Tisha's having been under 15 years old was an additional aggravating factor. The judge sentenced Danny to two death sentences for the murders, and 25 years without the possibility of parole for the attempted murder. The Arizona Supreme Court affirmed Danny's conviction and sentence on direct review. *State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996).

C

Two years later Danny filed a petition for state post-conviction relief ("PCR"). His PCR judge was the Honorable James Chavez, the same judge who had sentenced him to death. Judge Chavez conducted a limited evidentiary hearing to consider three ineffective assistance of counsel claims. Danny presented testimony from Randy Jones, Peggy Jones, and the defense lawyer at the hearing. Judge Chavez denied each claim. He found that the defense lawyer was not ineffective because "[t]he report and testimony of Dr. Potts ... adequately addressed defendant's mental health issues at sentencing," and "[t]estimony at the hearing showed that [the defense lawyer] presented the available witnesses and evidence to support mitigation. The additional witnesses and evidence suggested by petitioner would have been redundant." Accordingly, Judge Chavez held "that the petitioner has not met its [sic] burden of proof of showing deficient performance by trial counsel." The Arizona Supreme Court denied review. *State v. Jones,* No. CR-00-0512-PC (Ariz.Sup.Ct. Feb. 13, 2001).

D

Danny subsequently filed his federal petition for habeas relief. The district court granted an evidentiary hearing with regard to Claims 20(O), 20(P), and 20(T). Claim 20(O) is based on the defense lawyer's failure to secure the appointment of a mental health expert. Claim 20(P) is based on the defense lawyer's failure to move for neurological and neuropsychological testing. Claim 20(T) is based on the defense lawyer's failure to present additional mitigation witnesses and evidence.

Dr. Potts testified first at the district court hearing. He explained: "I was not an expert for either party. I was the Court's expert in looking at some issues. I was not-it was clear I was not hired for mitigation, nor was I hired for aggravation." When asked whether or not he had enough "points of data" to pull from in reaching his conclusions, he stated:

> [T]here's a clear distinction between a mitigation specialist, and I'm no mitigation specialist. I may be a part of a team of mitigation, but I'm clearly not a mitigation specialist in the realm of what is dealt with now in capital cases....
>
> Mine was a cursory examination.... [I]nterviewing one family member certainly is not adequate, I believe, for what would be considered capital mitigation. It is below the standard of care.

He stated that, prior to his testimony at sentencing, he had recommended to the defense lawyer there should be some neuropsychological testing. During cross-examination, the state tried to get Dr. Potts to admit that he only called for neurological testing, not neuropsychological testing, but Dr. Potts explained that "[s]ophisticated neurological testing would include that."

He described the reports submitted by the additional experts at the habeas proceeding as the "documents I think one would expect to see in mitigation.... I believe they're very, very helpful, and I think-I know I would have liked to have had the exhaustive nature of these reports." He stated that he found his role constrained by his court-appointed status, and therefore "did not make diagnoses," because his "role

was not to make diagnoses ... and that's why I would not have. I could have ... but that was not the nature or tenor of any of this report...."

Danny's defense lawyer testified that another lawyer in the Public Defender's Office was originally responsible for working on mitigation, and after she left he was assisted by an investigator in his office. The assisting lawyer left the trial team a few months before trial, and the defense lawyer decided that he "would actually be better off just finishing the case [him]self," rather than working with another attorney in his office with whom he had personal conflicts. He stated that while the Public Defender's Office had some funds available for experts, he was told that he should try and get funding from the court instead. He therefore requested $5,000 from Judge Chavez, and Judge Chavez gave him $2,000. He never requested additional funding.

The defense lawyer testified that Dr. Potts "did not act as a neutral, detached court-appointed expert. He actively assisted us in developing mitigation, planning strategy to a much larger degree than what he indicated." The defense lawyer explained that he had "numerous phone conversations" with Dr. Potts, they met together the night before Dr. Potts testified, and Dr. Potts "stressed to ask for the continuance for the additional testing."

He explained that it was not common practice in his county to hire aggravation/mitigation specialists in capital cases, and that he had no reason to think Randy had ever abused Danny. Furthermore, since an addictionologist had testified about the effects of amphetamines during the guilt phase of the trial, the defense lawyer did not think there was any reason to

have her testify at the sentencing phase in front of the same judge. Finally, he stated that he flew up to Reno, Nevada, to meet with Peggy and Randy in October before the sentencing hearing, and he spent three days there looking for background evidence.

Dr. Pablo Stewart, Chief of Psychiatric Services at Haight Ashbury Free Clinic in San Francisco, California, estimated that he spent 130 hours working on Danny's case. He diagnosed Danny with cognitive dysfunction, PTSD, polysubstance abuse, and mood disorder, not otherwise specified. He ultimately concluded that "[t]he circumstances surrounding Mr. Weaver's death are a direct consequence of [Danny's] abused and unfortunate past." He also found that Danny had suffered multiple serious head injuries over the course of his life.[FN3]

> FN3. These injuries included: (1) Peggy finding Danny unconscious on the side of his swing set when he was five years old; (2) falling off a roof and hitting his head on a metal dolly causing five to ten minutes of unconsciousness when he was 11; (3) falling off a second-floor scaffolding and hitting his head when he was 15; (4) being involved in three car accidents where he lost consciousness; and (5) a mugging while he was in the Marines when he was found unconscious on the side of the road and taken to the hospital-he was discharged with a diagnosis of head trauma, alcohol intoxication, and resolved apparent concussion.

Dr. Stewart discussed PTSD and explained that Danny suffered numerous traumatic experiences

early in his life: he watched his first step-father hold a jigsaw to his mom's neck and threaten to kill her, he watched that same step-father shoot a gun at his mom, and on two separate occasions Randy pointed a gun to his own head and threatened to kill himself in front of Danny. On cross-examination the state challenged Dr. Stewart's PTSD diagnosis because Dr. Stewart stated that Danny "had PTSD at the time of the murders," but he never stated that Danny was having a flashback while committing the crimes. Dr. Stewart explained that while the media tends to show PTSD as being a person "who is thinking he's being ambushed and he takes people hostage," that only occurs "very, very rarely."

> The much more overwhelmingly more common thing that occurs is a person having a short fuse; a person overreacting to a situation; a person finding themselves challenged by some things and then just going off; a person-and that's PTSD. A person who drinks too much and then gets into fights, those are the more common thing. But those don't sell movies or books.
>
> But that's the more common presentation. So that's why I'm saying in the case of Mr. Jones, it's absolutely clear that he suffers from PTSD, in my opinion, and that he carries that with him throughout his entire life. Certainly on the day of these murders, that was going on.

Dr. Stewart also testified that Danny's step-grandfather forced Danny to drink alcohol when Danny was only nine years old. He explained that it appears the grandfather used the alcohol to get Danny drunk so it would be easier to sexually abuse Danny. Dr. Stewart described the sexual abuse "as

full contact sexual abuse, including sodomy, including oral sex, both the providing it and receiving it." Danny became a daily marijuana user when he was in junior high, he used one gram of cocaine every weekend in high school, and he used LSD 200 times. Dr. Stewart explained that the substance abuse appears to have stemmed from Danny's genetic predisposition, and also because Danny used drugs to self-medicate to cope with his mental defects and past trauma.

Dr. Alan Goldberg, a psychologist in Arizona with a speciality in neuropsychology, conducted a battery of tests that covered multiple domains of cognitive functioning. Dr. Goldberg gave Danny approximately 25 tests and found that "when we look at the patterns across many different kinds of tests ... we see a consistent inconsistency in performance, that is, the performance is problematic on a number of tests that all have an attention component to them." He ultimately diagnosed Danny with a learning disability, attention deficit disorder, and Bipolar Disorder, Depressed.

Danny also submitted reports from additional experts, including Dr. David Foy, a professor of psychology at Pepperdine University. Dr. Foy diagnosed Danny with PTSD, polydrug abuse, depressive disorder, compromised cognitive emotional functioning, and various learning deficits. Dr. Foy described the numerous instances of life-threatening family violence Danny witnessed growing up, and found that on at least two occasions Danny used a baseball bat to protect himself: (1) when Danny threatened to kill Danny's first stepfather if he did not stop beating Danny's mother, and (2) in order to stop Danny's step-grandfather

from continuing to sexually abuse him. Dr. Foy concluded that

> [t]he constant threat of sudden verbal attacks or severe physical punishment in Danny's home environment would be expected to produce an essential state of wariness or hypervigilance ... [and] would be expected to lead to a heightened suspiciousness and combat readiness as a systematic way of responding, even in situations which later proved to be non-life threatening.

Finally, Danny submitted a declaration from his younger sister Carrie Haigney. She said that twice Danny watched Randy point a gun at his own head and threaten to kill himself. She stated that contrary to Randy's testimony during sentencing, Randywas both verbally and physically abusive to Danny, and that Danny threatened to kill Randy if he kept beating Peggy. She also confirmed that Danny suffered numerous head injuries while growing up.

Dr. John Scialli, a practicing psychiatrist in Arizona, was Arizona's primary expert witness.FN4 He spent approximately 46 hours working on Danny's case, and diagnosed Danny with alcohol dependence, amphetamine dependence, canabis dependence, and AD/HD residual type at the time of the offense. He disagreed with the other experts who diagnosed Danny with a mood disorder, cognitive impairment or dysfunction, or PTSD.

> FN4. Two other experts testified for Arizona in the district court. Dr. Steve Herron, Danny's treating psychiatrist for two years on Death Row, testified that Danny never showed any classic signs of PTSD over the years they

> interacted. Dr. Anne Herring testified that Danny's test scores show that he is generally in the average range and do not support a diagnosis that Danny has a cognitive disorder or attention deficit disorder.

Dr. Scialli concluded that "there is no direct connection made between PTSD and the offenses. Rather, the PTSD is viewed as a primary mover of a series of life events with drug abuse being the common thread." Dr. Scialli did diagnosis Danny with AD/HD residual type, but found that it had no effect on the crime because there is no "link between someone with an attention deficit disorder and violent behavior." He opined that Danny never suffered any serious head trauma significant enough to cause lasting brain damage: while "[t]he defendant may have had some concussions with brief periods of unconsciousness," "[t]here is not a strong history of lasting brain damage."

Dr. Scialli's report and testimony also addressed Danny's ineffective assistance of counsel claims. He concluded that none of the new evidence would have changed the sentencing profile: "[t]he neuropsychological testing which has been done since the sentencing does not provide any information in addition to that to which Dr. Potts had testified." He found that "there is not evidence that there were any significant mental conditions around the time of the crimes," and that none of the recent experts "were able to make a stronger connection between Plaintiff's mental condition and the crimes." He further found that any additional test results would not have changed the sentencing result because "[t]heoretically if some study had been done and had proved abnormal, it would have been supportive of

Dr. Potts' findings. The Court, however, did not take issue with Dr. Potts' findings."

E

The district court dismissed each ineffective assistance of counsel claim. The court denied Claim 20(O) because the defense lawyer's "failure to seek the appointment of a mental health expert in a more timely manner did not prejudice Petitioner." The district court concluded that "the Court has not been presented with evidence confirming that Petitioner suffers from neurological damage caused by head trauma or other factors. Therefore, Dr. Potts's finding at sentencing remains the most persuasive statement in the record that neurological damage constituted a mitigating factor." The district court dismissed Claim 20(P) after finding that Danny could only prove that he suffered from AD/HD residual type and possibly a low level mood disorder. The district court "conclud[ed] that the trial court would have assigned minimal significance to testimony indicating that Petitioner suffered from ADHD [sic] and a low-level mood disorder, and that this weight would not have outbalanced the factors found in aggravation." Finally, the district court dismissed Claim 20(T) after finding that Danny did not prove any significant mitigating evidence could have been presented through additional witnesses at sentencing. The district court recognized that new evidence of physical, emotional, and sexual abuse was presented through the reports of various experts, but found that even though the experts accepted that the abuse happened in diagnosing PTSD, none of them could "extend their diagnoses" and "establish a nexus between the abuse and the murders."

Danny timely appealed the district court's denial of his petition for a writ of habeas corpus. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), governs Danny's habeas petition. AEDPA requires federal courts to show substantial deference to state court decisions. Federal habeas relief is therefore only available if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). The Supreme Court need not have addressed an identical fact pattern to qualify as clearly established law, as "even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007). Our Circuit precedent "may be 'persuasive authority' on the question of whether a state court's determination was an unreasonable application of the Supreme Court's precedent." *Mejia v. Garcia*, 534 F.3d 1036, 1042 (9th Cir.2008) (citations omitted). We review a district court's denial of a § 2254 habeas corpus petition de novo, *Bean v. Calderon*, 163 F.3d 1073, 1077 (9th Cir.1998), and a district court's findings of fact for clear error. *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir.1995).

II

Danny alleges that his defense lawyer was ineffective at sentencing by failing to: (1) secure the appointment of a mental health expert; (2) timely move for neurological and neuropsychological

testing; and (3) present additional mitigation witnesses and evidence. We agree.

In general, to prevail on an ineffective assistance of counsel claim, a petitioner must show that: (1) his trial counsel's performance "fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to satisfy the first prong and prove that counsel's performance was deficient, Danny must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Ainsworth v. Woodford*, 268 F.3d 868, 873 (9th Cir.2001) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). Our scrutiny of counsel's performance is highly deferential, and we "must make every effort 'to eliminate the distorting effects of hindsight.' " *Id.* (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Accordingly, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *637*Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "[T]he prevailing legal norms at the time" govern our review. *Jennings v. Woodford*, 290 F.3d 1006, 1015 (9th Cir.2002).

Under the prejudice prong, "[a] reasonable

probability is one 'sufficient to undermine confidence in the outcome,' but is 'less than the preponderance more-likely-than-not standard.' " *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir.2007) (quoting *Summerlin v. Schriro*, 427 F.3d 623, 640, 643 (9th Cir.2005) (en banc)). It is therefore "not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances." *Id.* (quotation marks and citation omitted). Instead, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). The totality of available mitigating evidence includes evidence "both ... adduced at trial, and the evidence adduced in the habeas proceeding[s]." *Williams v. Taylor*, 529 U.S. 362, 397, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

A

1

We first consider Danny's claims that his defense lawyer was ineffective for failing to obtain partisan expert witnesses and neuropsychological testing. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " *Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527 (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052) (second alteration in *Wiggins*). The Supreme Court has, however, consistently relied upon relevant ABA Guidelines in effect at the time of trial when reviewing attorney conduct and examining

reasonableness. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (referencing ABA Guidelines when considering ineffective assistance of counsel claim); *Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 (referring to ABA Guidelines as "well-defined norms," and "standards to which we long have referred as 'guides to determining what is reasonable' " (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052)); *Williams*, 529 U.S. at 396, 120 S.Ct. 1495 (citing ABA Guidelines to find "that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background").

The 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases provides several rules regarding expert witnesses. An attorney "should secure the assistance of experts where it is necessary or appropriate for ... presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(D)(7)(D) (1989) ("1989 Guidelines"). An attorney should also consider using "[e]xpert witnesses to provide medical, psychological, sociological, or other explanations for the offense(s) for which the client is being sentenced, [and] to give a favorable opinion as to the client's capacity for rehabilitation." *Id.* 11.8.3(F)(2). Finally, the 1989 Guidelines directs an attorney to at least consider presenting evidence during the sentencing phase regarding the defendant's: (1) medical history, (2) educational history, (3) military service, (4) employment and training history, (5) family and

social history, (6) rehabilitative potential, (7) prior record, and (8) "[e]xpert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing." *Id.* 11.8.6(B)(1)-(8).

"[W]e have held that 'to perform effectively ... counsel must conduct sufficient preparation to be able to present[ ] and explain[ ] the significance of all the available [mitigating] evidence.' " *Belmontes v. Ayers*, 529 F.3d 834, 857 (9th Cir.2008) (quoting *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir.2005)) (quotation marks omitted) (alterations in *Belmontes*). Capital defense attorneys therefore have an obligation to conduct a thorough investigation, and a "duty to investigate and present mitigating evidence of mental impairment." *Bean*, 163 F.3d at 1080. "This includes examination of mental health records," *Summerlin*, 427 F.3d at 630 (citation omitted), and having "an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir.2002) (citation omitted).

The PCR court denied Danny's ineffective assistance of counsel claims regarding expert witnesses and testing after concluding that "[t]he report and testimony of Dr. Potts who was appointed by the Court, adequately addressed defendant's mental health issues at sentencing." That conclusion was contrary to clearly established Supreme Court precedent. In *Ake v. Oklahoma*, the Supreme Court recognized a defendant's right to have "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470

U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). We later held that "under *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process." *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir.1990). "The right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate...." *Id.* at 1157. In *Lambright v. Schriro*, we granted habeas relief and held: "Counsel may not rely for the development and presentation of mitigation evidence on the probation officer and a court appointed psychologist. The responsibility to afford effective representation *is not delegable* to parties who have no obligation to protect or further the interests of the defendant." 490 F.3d at 1120-21 (emphasis added) (citation omitted). As the Supreme Court explained in *Ake*, without the assistance of a defense psychologist who can not only testify, but prepare counsel for cross-examination of the State's witnesses, the risk of inaccurately resolving the mental health issues presented grows impermissibly high. *Ake*, 470 U.S. at 82-83, 105 S.Ct. 1087.

Here, the defense lawyer failed to follow the ABA Guidelines, Supreme Court precedent, and Ninth Circuit law, and relied solely on Dr. Potts, a court-appointed expert, to testify about Danny's mental health at sentencing. [FN5]

> FN5. Addictionologist Lisa Sparks testified during the guilt phase, but she only addressed the possible effects methamphetamine would have had on Danny on the night of the murders. She did not discuss the possible lifetime effects of being a drug and alcohol

> abuser, and she did not discuss the possible reasons Danny originally became addicted to drugs in the first place.

Notwithstanding the defense lawyer's testimony that Dr. Potts "did not act as a neutral, detached court-appointed expert," and "actively assisted in developing mitigation, planning strategy," the district court's conclusion that Dr. Potts was a "de facto defense expert" was clearly erroneous. As a court-appointed expert Dr. Potts' findings were not confidential, he had "no obligation to protect or further the interests of the defendant," *Lambright*, 490 F.3d at 1121, and he did not sufficiently "assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83, 105 S.Ct. 1087. Dr. Potts stated repeatedly that he was a neutral expert and found his role limited as such.

We need look no further than the defense lawyer's treatment of Dr. Potts to recognize that he was not prepared nor thought of as a defense expert. As we have recognized, the "duty to provide the appropriate experts with pertinent information about the defendant is key to developing an effective penalty phase presentation." *Caro*, 280 F.3d at 1255 (citation omitted). A review of Dr. Potts' entire case file shows that only 31 pages came from the defense lawyer. The defense lawyer even admitted at the evidentiary hearing in the district court that because Dr. Potts was a court-appointed expert, he specifically chose *not* to send Dr. Potts all available mitigation evidence:

> THE COURT:So before Dr. Potts issued his report that turned out to be favorable to you, would you necessarily have provided all of the information you

had collected on Mr. Jones?

WITNESS:No, I would not, because it was after he got started, it was apparent he wanted to help us. And at that point, then, his role, I supposed, changed. And then our relationship was a little different.

Initially, I would screen what I sent him, because I honestly didn't know what we were going to get from him.

Dr. Potts' report was dated December 3, 1993, and the defense lawyer did not get the report until two days before the sentencing hearing started on December 8, 1993. Until at most two days before the sentencing hearing, nobody considered Dr. Potts as a defense expert, and the defense lawyer had only given Dr. Potts 31 pages to review. As we held in *Bean v. Calderon*: "When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel." 163 F.3d at 1079.

Arizona's contention that Dr. Potts was a de facto partisan defense witness stems from the defense lawyer's testimony in the district court that he had "numerous phone conversations" with Dr. Potts and "met for at least two hours the night before he testified in [Dr. Potts'] motel room to plan strategy, to go over things." Dr. Potts on the other hand stated that he met "[b]riefly" with the defense lawyer the night before the sentencing hearing and ate lunch with the defense lawyer the day he testified. The

district court accepted Arizona's argument and found that "[the defense lawyer] worked closely with Dr. Potts" and "Dr. Potts actively assisted [the defense lawyer] in developing a case in mitigation."

Even taking the defense lawyer's claims at face value, however, a few phone calls and a two hour meeting the night before trial, all after receiving Dr. Potts' report two days before the hearing, do not add up to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83, 105 S.Ct. 1087; *cf. Allen v. Woodford*, 395 F.3d 979, 1002 (9th Cir.2005) (finding deficient performance when counsel spent only one week preparing for sentencing).

"[W]hen 'tantalizing indications in the record' suggest that certain mitigating evidence may be available, those leads must be pursued." *Lambright*, 490 F.3d at 1117 (quoting *Stankewitz v. Woodford*, 365 F.3d 706, 719-20 (9th Cir.2004)). The defense lawyer was aware that Danny was using methamphetamine, alcohol, and marijuana around the time of the murders, yet he did not follow up on that information. He had an addictionologist testify at trial about the effects those drugs would have had on the night of the crime, but he did not have her testify at sentencing and he never asked her about the long term effects of a lifetime addicted to drugs. The defense lawyer knew that Danny had a difficult birth, he knew that Danny had been abused, he knew that Danny had suffered multiple head injuries, and he knew that Danny had been abusing alcohol and illegal drugs for over a decade. He had also been specifically informed by Dr. Potts that he should arrange neuropsychological testing. Yet given

all that information, the defense lawyer did not retain a partisan psychiatric expert. He provided Dr. Potts 31 pages of documents to review, and he met with Dr. Potts for two hours the night before Dr. Potts testified.

Even if Dr. Potts could be considered a de facto defense expert with regard to the side he was most helpful, he was not a defense expert with regard to the way he was treated, the access he was given, the information he was provided, and the way he was prepared. And when Dr. Potts recommended additional testing, the defense lawyer ignored his advice until after he testified. In considering a similar situation in *Bean*, we concluded that the lawyer was constitutionally ineffective. There, defense "counsel did not contact [the defense expert] to prepare him for the penalty phase until a day or two before his testimony, when he expended only one or two hours in readying his testimony." 163 F.3d at 1078. Here, the defense lawyer met with Dr. Potts the night before Dr. Potts testified, and they spent only two hours working on the testimony. We should keep in mind that Dr. Potts had no obligation to advance Danny's best interests.

Perhaps most telling is the defense lawyer's motion at capital sentencing for a continuance to investigate a mental health mitigation defense. Although the defense lawyer had talked with Dr. Potts by telephone on a few occasions and met with him the night before capital sentencing, it was not until Dr. Potts testified that defense counsel realized that he should have requested neurologic testing.

The PCR court's finding that the defense lawyer was not ineffective for failing to obtain a partisan mental

health expert and additional testing was directly contrary to the Supreme Court's opinion in *Ake*. Given Dr. Potts' late entrance into the game and court-appointed status, he could not "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83, 105 S.Ct. 1087. Furthermore, the ABA Guidelines, and our precedent have both recognized the importance of partisan psychiatric experts and testing in capital proceedings. We conclude that the defense lawyer's failure to obtain those critical elements of a capital defense was unreasonable under any reading of *Strickland*.

2

Establishing that defense counsel performed deficiently, alone, does not entitle Danny to relief. He must also show that he was prejudiced by that deficient performance. Because the PCR court concluded that Danny had received effective representation, it did not reach the question of prejudice. Therefore, in examining prejudice, "our review is not circumscribed by a state court conclusion with respect to prejudice, as ... the state court[ ] below[did not] reach[ ] this prong of the *Strickland* analysis." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527; *see also Rompilla*, 545 U.S. at 390, 125 S.Ct. 2456 ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo* ...." (citation omitted)).

The district court denied relief on Claims 20(O) and 20(P) after concluding "that the new information" presented below "is largely inconclusive or cumulative: it 'barely ... alter[s] the sentencing

profile presented to the sentencing judge' " (quoting *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052). It denied Claim 20(O) after finding that Danny would not have benefitted from having a partisan expert because his witnesses at the evidentiary hearing "have not established a more-persuasive case in mitigation than that presented through the report and testimony of Dr. Potts." In fact, it found that "Dr. Potts's findings at sentencing remains the most persuasive statement in the record that neurological damage constituted a mitigating factor." The district court denied relief on Claim 20(P) because "the results of the neuropsychological tests presented by the parties are largely ambiguous and inconclusive. They do not demonstrate that Petitioner suffered from cognitive impairment or PTSD at the time of the murders."

It was improper for the district court to weigh the testimony of the experts against each other in order to determine who was the most credible and whether Danny presented "evidence *confirming* that [he] suffers from neurological damage caused by head trauma or other factors." We have held that a district court should not independently evaluate which expert was most believable or try to find a definitive diagnosis:

> The district court dismissed evidence of Correll's brain injury, concluding that any organic brain injury played no role in Correll's crimes. The district court's conclusion was based on the judge's own evaluation of two conflicting experts. But in the procedural context of this case, the district court's role was not to evaluate evidence in order to reach a conclusive opinion as to Correll's brain injury (or lack thereof). The district court should

> have decided only whether there existed a "reasonable probability" that "an objective fact-finder" in a state sentencing hearing would have concluded, based on the evidence presented, that Correll had a brain injury that impaired his judgment at the time of the crimes.

Correll v. Ryan, 539 F.3d 938, 952 n. 6 (9th Cir.2008) (citation omitted); *see also Summerlin*, 427 F.3d at 643.

Danny presented experts at the evidentiary hearing who testified to his extensive history of physical, mental, and sexual abuse, numerous head injuries resulting in unconsciousness, and a lifetime of substance abuse. They diagnosed Danny with PTSD, AD/HD, cognitive dysfunction, and an affective mood disorder. Finally, they explained that his substance addictions likely stemmed from a genetic predisposition and his attempts to self-medicate.

Dr. Potts, conversely, was unable to make any specific diagnoses. Instead, he could only make conditional findings, including: "*strong evidence*" of an underlying mood disorder, "the *likelihood* that [Danny] suffers from a major mental illness," and head injuries "which increase[ ] *the potential* for neurologic sequelae contributing to his behavior." He submitted a six-page report to the court, which included an approximately one-page section on Danny's "Social and Developmental History." Dr. Potts did not find that Danny was ever sexually abused, and in fact the only physical abuse mentioned in the report was that: "[Richard Elan] was also physically and psychologically abusive to Danny," and "the defendant was reared in a chaotic and at times grossly hostile environment where

physical abuse was too prevalent." Dr. Potts then stated: "This new stepfather [Randy] was ... certainly not physically abusive. Also, it is to be noted that during the defendant's childhood his maternal grandmother and uncles and aunts were available and provided good support to him."

Dr. Potts' entire report was only six pages long. Dr. Stewart, on the other hand submitted a 30-page declaration including 15 pages devoted to Danny's life history. We have consistently held that merely skimming the surface on important issues does not make in-depth discussion cumulative. In *Lambright*, we found prejudice after the sentencing court "was provided with some limited information about Lambright's mental health problems," but "the information contained in those reports was conclusory and based solely on Lambright's own accounts of his history." 490 F.3d at 1125; *see also Correll*, 539 F.3d at 953 n. 8 ("While the bare facts of Correll's troubled past were indeed presented to the court, without further investigation and presentation of contextual evidence and argument such facts served only to demonize Correll rather than to mitigate the appropriateness of imposing the death penalty for his actions."); *Bean*, 163 F.3d at 1079 (finding prejudice when experts "gave newly definitive and expansive opinions on Bean's mental impairments, based on the information about Bean's social history and other recent testing that was newly available to them").

The defense lawyer did present evidence to the court regarding Danny's drug induced impairment on the night of the murders, but he did not take the next critical step: to explain why Danny had pursued a life of substance abuse. Dr. Potts briefly mentioned

self-medication in his report and his testimony. Dr. Stewart, however, testified extensively about how Danny's genetic predisposition, combined with his abusive childhood, led him down the path of polysubstance abuse:

> And the other exceedingly important component in his substance use history is the notion of self-medication. Self-medication is an absolutely accepted term in the field of mental health substance abuse....
>
> And in the case of Mr. Jones, he ... experienced this horrific amount of trauma, PTSD, so his pre-existing psychiatric disorder is posttraumatic stress disorder, and then he is using substances. And I remember seeing some reports and reading about marijuana, and marijuana is a real clear selfmedicating drug for PTSD because of its antianxiety properties. Same with alcohol....
>
> He also has been diagnosed and confirmed he was suffering from AD/HD.... You can even use methamphetamine to treat that.
>
> And it's very common that people with untreated AD/HD will often self-medicate with a psycho stimulant, like methamphetamine or cocaine, in part to address the symptoms of their pre-existing condition. It's very clear in the field that untreated mental illness is a risk factor for substance abuse. Okay, self-medication, but that certainly was a big factor in this particular case. Not in everyone's, but in Mr. Jones' particular case.

Furthermore, Dr. Stewart testified that Danny was first introduced to alcohol and drugs when he was

nine years old by his step-grandfather so that his step-grandfather could more easily sexually abuse him. In *Lambright*, we held there was prejudice after finding that defense counsel failed to explain that Lambright's long dependency on drugs and alcohol stemmed from rampant abuse in his family, and he was first exposed to drugs by his mother. *Lambright*, 490 F.3d at 1124. In *Boyde v. California*, the Supreme Court recognized that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." 494 U.S. 370, 382, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (emphasis, citation, and quotation marks omitted). In *Caro*, we concluded that:

> the evidence that was omitted is compelling. The jury was not afforded the benefit of expert testimony explaining the effects that Caro's *physiological* defects would have on his behavior, such as causing him to have "impulse discontrol" and irrational aggressiveness. By explaining that his behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced.

280 F.3d at 1258.

Here, the sentencing judge knew that Danny was under the influence of drugs at the time of the murders, and therefore he knew that Danny's judgment was impaired. However, the judge did not know that Danny had been using drugs and alcohol

beginning when he was nine years old in order to cope with his mental illnesses and significant abuse. It is much easier to discount the effects of substance abuse when the facts which led to the abuse are unknown, but much less so when we gain insight into the particular circumstances an individual was facing when he began abusing drugs.

"More than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system." *Id.* (citing William Blackstone, 4 Commentaries *24-25). The sentencing judge was given a short and conditional report lacking any specific diagnoses. Conversely, at the federal evidentiary hearing Danny presented the persuasive testimony of numerous experts that he suffered from serious mental defects, was viciously abused throughout his childhood, and was driven to become a polysubstance abuser in order to self-medicate for the trauma he experienced and the defects he had.

The district court's conclusion that Danny did not suffer prejudice because the neutral, court-appointed psychologist's testimony was the most persuasive testimony presented only highlights the greater potential for presenting effective mitigation evidence from a psychologist appointed to assist the defendant. Given the record, Danny has sufficiently undermined our confidence in the capital sentencing decision to establish *Strickland* prejudice.

B

1

Danny next contends that the defense lawyer was

ineffective by failing to conduct a reasonable mitigation investigation and present sufficient witnesses and evidence at sentencing. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' " *Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 (quoting 1989 Guidelines 11.4.1.(C)). "Preparing for the penalty phase of a capital trial is the equivalent of preparing for an entirely new trial, and trial counsel must treat it as such." *Turner*, 281 F.3d at 891. Accordingly, the "preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case." 1989 Guidelines 11.8.3(A); *see also id.* 11.4.1(A). The defense lawyer failed to discover all reasonably available evidence or conduct a reasonable investigation. Accordingly, the PCR court's decision was both contrary to clearly established federal law, and an unreasonable application of the facts, when it concluded that "[t]estimony at the hearing showed that [the defense lawyer] presented the available witnesses and evidence to support mitigation. The additional witnesses and evidence suggested by petitioner would have been redundant."

The defense lawyer's investigation and presentation of mitigating evidence was woefully inadequate. He failed to interview necessary witnesses and track down critical documents, and ended up presenting a false portrait to the sentencing judge that incorrectly showed Danny as having a much nicer childhood than he had in fact. The defense lawyer never even interviewed Danny's sister, and described his investigation as follows:

> In October of-of 1993, myself and [the investigator] flew to Reno and spent three days up there devoted to all this case, and we spent an evening with Danny's parents at their home. The rest of that time we went around tracking down records. We talked to *at least one* individual that remembered Danny who had been a counselor up there, but he was somebody that we didn't feel would be a good witness, either. But we did find some people like that up there.

Danny was convicted in September 1993, so the defense lawyer did not even go to interview Danny's parents until one month after the trial and less than two months before sentencing. The failure to start the mitigation investigation until after the guilt phase flies directly in the face of the 1989 Guidelines, which directs an attorney to start preparing for sentencing as soon as he starts working on the case.

In *Correll*, we held that counsel deficiently failed to investigate when he interviewed or tried to interview "forty or fifty witnesses." 539 F.3d at 944. Counsel there interviewed all members of the defendant's family who would cooperate, including one meeting with "Correll's father, sister, and brother, 'around the kitchen table at the same time,' " where he spent " 'a couple hours' with them." *Id.* at 945. That deficient investigation was significantly more thorough than the defense lawyer's investigation here.

Arizona contends that the defense lawyer cannot be faulted for failing to discover Randy's and Danny's step-grandfather's abuse because Danny did not

share that information until ten years after the trial. However, even when a defendant is "not forthcoming with useful information ... [that] does not excuse counsel's obligation to obtain mitigating evidence from other sources." *Douglas v. Woodford*, 316 F.3d 1079, 1088 (9th Cir.2003) (citation omitted). We held counsel's performance deficient in *Karis v. Calderon*, when he only spoke to the defendant's mother, brother, and aunt. 283 F.3d 1117, 1136 (9th Cir.2002). Those witnesses were uncooperative and did not provide information about abuse, but "[t]he fact that they did not offer this information regarding the abuse did not excuse counsel from further investigation." *Id.*

In this case, the defense lawyer cannot pin his failure to uncover evidence on an uncooperative family, because he did not even interview Danny's sister, Carrie Haigney. As soon as she was contacted she submitted a declaration to the district court in which she explained that Randy: (1) on two occasions held a gun to his head and threatened to kill himself, (2) was both physically and verbally abusive to Danny and Haigney, and (3) abused their mother so severely that when Danny was only seven or eight years old he threatened to kill Randy if Randy did not stop abusing Peggy. When Randy was eventually confronted with Haigney's declaration by Dr. Stewart, "he clearly admitted ... the physical abuse that was to his wife and ... to his Danny [sic] and his sister." This information was not hidden for ten years because the family was uncooperative; it was hidden because the defense lawyer never asked the question. While we do not require "defense lawyers to scour the globe on the off chance something will turn up," *Rompilla*, 545 U.S. at 383, 125 S.Ct. 2456, reasonable counsel may only "draw a line when they

have good reason to think further investigation would be a waste." *Id.*

"In assessing the reasonableness of an attorney's investigation, ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527. The defense lawyer was aware that **Danny's** childhood abuse was perhaps the greatest mitigating evidence available, and he therefore had no justifiable excuse not to interview **Danny's** sister. Had the defense lawyer taken that simple step he would have found evidence that indicated his lead witness at sentencing, Randy **Jones**, was an alleged child abuser who created a traumatic and dangerous home. By delving into Randy's abuse, the defense lawyer could have discovered not only that Randy abused **Danny**, but also that **Danny** used a baseball bat as a weapon to protect his mother from beatings.

The defense lawyer's haphazard investigation also failed to uncover two other critical pieces of information: (1) that **Danny** attempted to commit suicide when he was 23 by "cutting his wrists and cutting his chest ... with a broken bottle," and (2) that **Danny** was "[s]ubjected to repeated episodes of severe sexual abuse" by his step-grandfather. The sexual abuse "includ[ed] sodomy, includ[ed] oral sex, both the providing it and receiving it."

Rather than investigating for mitigation evidence immediately and treating the sentencing phase as its own separate trial, the defense lawyer waited until after Danny was convicted to even travel to Reno to interview Peggy, Randy, and "at least one individual

that remembered Danny." Contrary to the PCR court's ruling, the evidence did not show "that [the defense lawyer] presented the available witnesses and evidence to support mitigation." The defense lawyer did not discover that Danny was abused by Randy and his step-grandfather, that Danny attempted to commit suicide, and that Danny during his childhood defended himself and his mother with baseball bats when placed in dangerous situations. While we have recognized "it is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase," *Summerlin*, 427 F.3d at 630 (citation, quotation marks, and alteration omitted), we would be hard-pressed to find that the defense lawyer unearthed much more than a scintilla of relevant mitigation evidence here. This failure to uncover evidence cannot be excused as reasonable performance after conducting a thorough investigation. Rather, it was an unreasonable investigation that fell below the level of performance required by the Sixth Amendment.

2

The prejudice that stemmed from the defense lawyer's deficient investigation and presentation of evidence significantly undermines our confidence in the sentence. The defense lawyer's failure to uncover evidence of Randy's and Danny's step-grandfather's abuse resulted in presenting a completely inaccurate picture of Danny's life to the court. As discussed above, because the PCR court only made findings regarding the *Strickland* deficiency prong, we consider the prejudice prong de novo. *See Rompilla*, 545 U.S. at 390, 125 S.Ct. 2456; *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527.

The only abuse described during the sentencing hearing happened when Richard Elan was still married to Peggy and Danny was less than six years old. In fact, Dr. Potts stated that to his "recollection and knowledge [Danny] did not suffer child abuse when he was with his [current] father, nor his mother." Therefore, while Dr. Potts and Randy did testify about Danny's difficulties as a very young child, the sentencing judge was left with the erroneous belief that Danny lived in a loving and supportive home once Elan left. Evidence now shows that nothing could be further from the truth.

Danny presented evidence to the district court that Randy was an abusive step-father, that he held a gun to his head in front of Danny at least twice and threatened to kill himself, and that Danny threatened to kill Randy if Randy kept beating Peggy. Experts testified that Danny's step-grandfather started sexually abusing Danny when Danny was nine years old, and did not stop until Danny threatened him with a baseball bat when Danny was thirteen years old. Danny also showed that his step-grandfather provided him alcohol and marijuana when he was nine years old.

The district court concluded that there was no prejudice in the failure to present evidence of a lifetime of abuse at the sentencing hearing because it found a "lack of a causal connection between the crimes and the new allegations of abuse." That finding was clearly erroneous. First, Dr. Stewart testified that "[t]he circumstances surrounding Mr. Weaver's death are a direct consequence of [Danny's] abused and unfortunate past." Second, the Supreme Court has explicitly held that a capital defendant

need not show any causal connection with the crime. Rather, the evidence need only be "of such a character that it might serve as a basis for a sentence less than death." *Tennard v. Dretke*, 542 U.S. 274, 287, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (internal quotation marks omitted) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). Precisely this type of evidence can serve as a basis for a sentence less than death:

> Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care.... Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability.

Wiggins, 539 U.S. at 535, 123 S.Ct. 2527 (citations omitted).

The *Wiggins* Court ultimately granted relief after concluding: "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 537, 123 S.Ct. 2527 (citations omitted).

The decision of life or death was given to the sentencing judge with a false picture of Danny's life. Judge Chavez had no idea any physical abuse lasted past Danny's sixth birthday, and he had no idea that the tremendous abuse likely played a key role in leading Danny down the path of polysubstance abuse

that he ultimately traveled. "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury...." *Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456.[FN6] "We have held ... that a defendant was prejudiced when, although counsel introduced some of the defendant's social history, he did so in a cursory manner that was not particularly useful or compelling." *Stankewitz*, 365 F.3d at 724 (citation and quotation marks omitted); *see also Bean*, 163 F.3d at 1081 ("[T]he family portrait painted at the federal habeas hearing was far different from the unfocused snapshot handed the superior court jury."). Here, as in *Stankewitz*, "[a] more complete presentation, including even a fraction of the details [Petitioner] now alleges, could have made a difference." 365 F.3d at 724.

> FN6. "Although, for the purposes of resolving this issue, we evaluate prejudice in the context of judge-sentencing, the result is the same." *Summerlin*, 427 F.3d at 643.

C

We have previously held that "prejudice may result from the cumulative impact of multiple deficiencies." *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir.1995) (quotation marks omitted) (quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir.1978) (en banc)). Therefore, while we hold that the lack of neuropsychological testing, partisan mental health experts, and the failure to accurately present Danny's life history each would be sufficient to undermine confidence in the sentence on their own, in combination there can be no question that the deficiencies were fatal.

III

Because we conclude that Danny received ineffective assistance of counsel warranting relief, we do not address the remainder of his claims on appeal. We reverse and remand to the district court with instructions to issue the writ of habeas corpus.

REVERSED AND REMANDED.

789677

FILED
Jan 25 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANNY LEE JONES,	)	No. 07–99000
	)	
Petitioner – Appellant,	)	D.C. No. CV–01–00384–SRB
	)	District of Arizona
	)	Phoenix
DORA B. SCHRIRO,	)	
	)	
Respondent – Appellee.	)	ORDER
	)	

Before: THOMAS, Circuit Judge and En Banc Coordinator.

A circuit judge sua sponte requested a vote on whether to rehear this matter en banc, and requested that the parties submit briefing on this issue. After supplemental briefs were filed, the request for a vote was withdrawn, and no other circuit judge has requested a vote. En banc proceedings in this case are concluded.

United States District Court,
D. Arizona.
Danny Lee **JONES**, Petitioner,
v.
Dora **SCHRIRO**, et al., Respondents.
No. CV-01-384-PHX-SRB.

Aug. 29, 2006.

Fredric F. Kay, Federal Public Defender's Office, Phoenix, AZ, Leticia Marquez, Sylvia Jeanne Lett, Federal Public Defender's Office, Tucson, AZ, for Petitioner.

Dawn Marie Northup, Jon George Anderson, Office of the Attorney General, Capital Litigation Section, Phoenix, AZ, for Respondents.

DEATH PENALTY CASE

ORDER RE: CLAIMS 20(*O*), 20(P), AND 20(T)

SUSAN R. BOLTON, District Judge.

Danny Lee Jones (Petitioner) is an Arizona inmate seeking federal habeas relief in connection with his convictions and death sentences for the first-degree murders of Robert and Tisha Weaver. On March 21-23, 2006, the Court held an evidentiary hearing regarding Claims 20(O), 20(P), and 20(T) of Petitioner's amended habeas petition. The claims allege ineffective assistance of trial counsel at sentencing based on counsel's failure to investigate and present mitigating evidence. (Dkt. 54 at 126-

29.)[FN1] On June 9, 2006, the parties submitted written closing arguments. (Dkts.218, 219.) For the reasons set forth herein, the Court finds that Petitioner is not entitled to relief.[FN2]

> FN1. "Dkt." refers to the documents in this Court's case file.
>
> FN2. The Court will address Petitioner's remaining habeas claims in a separate order.

STATE COURT PROCEEDINGS

1. Trial and sentencing

In 1993 Petitioner was tried in Mohave County Superior Court for the murder of Robert Weaver and Weaver's seven-year-old daughter, Tisha, and the attempted murder of Weaver's seventy-four-year-old grandmother, Katherine Gumina. [FN3] Petitioner was represented by Mohave County Assistant Public Defender Lee Novak. At the outset of the case, Novak was assisted by Katie Carty, a young attorney in his office.

> FN3. Ms. Gumina ultimately died as a result of her injuries, but the State chose not to amend the indictment. *State v. Jones*, 185 Ariz. 471, 478, 917 P.2d 200, 207 (1996).

The trial evidence showed that all of the victims were attacked with a baseball bat. The evidence also

indicated that the child was dragged out from under a bed, then beaten and strangled or smothered. After the murders, Petitioner, who was unemployed and the subject of outstanding warrants, removed the gun collection from the victims' house and traveled to Las Vegas, selling the guns to pay for cab fare and living expenses.

At trial Petitioner testified that he killed Weaver in self-defense and that he struck Ms. Gumina reflexively when she startled him. He further testified that while he was fighting with Weaver in Weaver's garage, Frank Sperlazzo, an acquaintance of Petitioner who was attempting to collect a drug debt from Weaver, entered the house and killed Tisha as he was stealing Weaver's guns. Also testifying on Petitioner's behalf was Dr. Lisa Sparks, M.D., an expert on addictions, who detailed the effects of Petitioner's long-term substance abuse, particularly his abuse of methamphetamine.

On September 13, 1993, the jury convicted Petitioner on all counts. The trial court set sentencing for November 8, 1993, ordered a presentence report ("PSR"), and granted Petitioner's request for a mental health examination pursuant to Arizona Rule of Criminal Procedure 26.5.

At a presentence conference on October 28, 1993, the court granted Novak's unopposed request to continue sentencing and ordered Dr. Potts to complete his Rule 26.5 evaluation by November 29, 1993. (ROA at 32; RT 10/28/93 at 3-4.)[FN4] Because Dr. Potts wanted to review the probation department's PSR before

completing his evaluation, the court ordered that the PSR be completed by November 4, 1993, and set a further presentence conference for December 1, 1993. (RT 10/28/93 at 3-4.) The sentencing hearing was scheduled to begin on December 8, 1993. (*Id.*) On November 22, 1993, the court held a hearing at Novak's request because Dr. Potts had not yet evaluated Petitioner; following the hearing, Petitioner was transported to Phoenix for the evaluation. (RT 11/22/93 at 2; ROA 235.) Dr. Potts interviewed Petitioner on November 26, 1993. (RT 12/1/93 at 2.) At the presentence conference on December 1, 1993, the court informed the parties that it had transmitted a copy of the PSR to Dr. Potts, who had not previously received it, and indicated that Dr. Potts was to submit his report on December 6. (*Id.*) Both parties informed the court that they were arranging for witnesses to appear at the December 8 hearing. (*Id.* at 3.) Although the record does not indicate when the parties received Dr. Potts's report, it was dated December 3. (Ex. 23.)

FN4. "RT" refers to the state court reporter's transcript; "ROA" refers to the three-volume record on appeal from trial and sentencing prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-93-541-AP). "ROA-PCR" refers to the four-volume record on appeal from post-conviction proceedings prepared for Petitioner's petition for review to the Arizona Supreme Court (Case No. CR-00-512-PC). The original reporter's transcripts and certified copies of the trial and post-conviction records were provided to this

Court by the Arizona Supreme Court. (*See* Dkt. 14.) "Ex." refers to the exhibits admitted at the evidentiary hearing before this Court.

On December 8, 1993, the sentencing hearing was held. As part of Petitioner's mitigation case, Novak presented testimony from Petitioner's stepfather, Randy Jones. Jones testified that Petitioner's biological father, the first husband of Petitioner's mother, physically abused Petitioner's mother while she was pregnant-in one instance throwing her down a flight of stairs-and that during Petitioner's birth her heart had stopped and forceps had been used to deliver Petitioner. (RT 12/8/93 at 41, 44-45.) Jones testified that when Petitioner was four, he experienced black-outs, and for years thereafter bruised easily due to a calcium deficiency. (*Id.* at 42-46, 65.) He testified that Petitioner's first stepfather, the second husband of Petitioner's mother, verbally and physically abused Petitioner, Petitioner's half-sister, and Petitioner's mother. (*Id.* at 42-46.) Jones also testified about various head injuries suffered by Petitioner, which occurred when Petitioner was approximately thirteen, fifteen, and nineteen years old. (*Id.* at 47-48, 49, 50, 65.) In each of the first two incidents, Petitioner had fallen off roofs; although he was treated for concussions, no medical records were available. (*Id.* at 48, 49, 65-67.) The last incident, which, according to Jones, resulted in unconsciousness and hospitalization, occurred during a mugging while Petitioner was serving in the Marines. (*Id.* at 50.) Jones also testified regarding Petitioner's history of drug and alcohol use, which began when he was about thirteen, and his

participation in drug treatment programs, including an in-house facility in San Francisco where he stayed for almost two years. (*Id.* at 52-61.) Jones described how Petitioner's behavior deteriorated after he began abusing substances; he also described Petitioner's behavior as improving when he was placed on the drug lithium. (*Id.* at 51-52, 55-57, 60-61.)

Dr. Potts took the stand after hearing Jones's testimony. Dr. Potts testified that he had been unaware at the time he wrote his report that Petitioner had fallen off a roof when he was fifteen. (*Id.* at 77-78.) He noted another head injury Petitioner suffered when he was six or seven in which he was reportedly unconscious for about twenty minutes; this incident had not been mentioned by Jones. (*Id.*) Dr. Potts also noted that he had not included in his report Petitioner's episodes of passing out when he was four. (*Id.*) However, Dr. Potts stated that these additional incidents did not cause him to alter his opinions regarding Petitioner's condition. (*Id.* at 78.) When asked whether he believed he had adequate data to offer an opinion regarding mitigating findings, Dr. Potts stated that he was always willing to review additional information, and that:

> I believe everything I reviewed and what I have heard about the case and reviewed with the defendant, his comments to me. I would have liked, and I think I have-I think it would be valuable to have had some neurologic evaluations, not-by a neurologist, clinical exam, such as a CAT scan, possibly an MRI, possibly EEG, possibly some

sophisticated neurological testing, because I think there's very strong evidence that we have-well, there's clear evidence that we have, I believe, of traumatic brain injury, and there's some other evidence that I believe we may have organic neurologic dysfunctions here that has gone on since he's been about 13. So, there's some other testing that I think would be valuable to have to pin down the diagnosis. Again-

Q. And you think that further testing might shed some additional light on, perhaps, some of these factors you listed and maybe why Mr. Jones behave[d] in the way he did on March 26, 1992?

A. Yes. I think it could help in clarifying and giving us etiology as the behavioral components, the explosive outbursts, the aggression, the mood changes, and the changes that occurred in his personality as noted by his mother when he was about 13, 14 years of age.

Q. In your opinion, could that information possibly provide significant mitigating, any-a significant mitigating factor as to what would be relevant to the issues at this hearing?

A. Clearly I think it would be corroborative of my clinical impressions and my diagnostic impressions in my report.

(*Id.* at 78-80.)

Dr. Potts then identified seven factors that he

considered mitigating. (*Id.*) First was Petitioner's "chaotic and abusive childhood" and its effect on his mental health and development, about which Dr. Potts offered detailed testimony. (*Id.* at 80-83.) Dr. Potts also listed as mitigating circumstances Petitioner's history of significant substance abuse, the likelihood that he suffered from an attenuated form of bipolar disorder, the fact that he had a history of multiple head traumas, and genetic loading for substance abuse and affective disorders. (*Id.* at 83-92, 94-98, 100-04.) In discussing Petitioner's head traumas, Dr. Potts noted that there were usually "long term neurologic sequelae" that can damage the brain and make it susceptible to other changes, such as lowered thresholds for aggressive outbursts. (*Id.* at 100.) He testified that additional testing would "clearly assist in coming to a more definitive conclusion" regarding whether Petitioner had brain damage. (*Id.* at 103.) Dr. Potts recommended additional testing "specifically for forensic purposes." (*Id.* at 137.)

Following Dr. Potts's testimony, Novak asked the court for a continuance to obtain the testing recommended by Dr. Potts as additional potential mitigation and to bolster the basis for Dr. Potts's opinion, which the prosecution had challenged in part because such testing had not been conducted. (*Id.* at 150-51, 165.) Novak explained that until he had received Dr. Potts's report, two days prior to the hearing, and heard his testimony, he had not realized the significance of Petitioner's history of head traumas with respect to possible neurological damage. (*Id.*) The prosecution opposed the request,

arguing that a factual basis did not exist for neurological testing. (*Id.* at 153-54.) Novak replied that Dr. Potts had not had sufficient time prior to the hearing to obtain neurological testing after receiving materials from the parties. (*Id.* at 154-55.) After briefly taking the request under advisement, the trial court denied it, noting that Novak had previously retained Dr. Sparks, who had testified at trial, and stated that "if there were any follow-up questions of a psychological or neurological nature, I would think that the defense would have followed them up" prior to sentencing. (RT 12/8/93 at 165.) The court indicated that it would review the transcript of Dr. Sparks's trial testimony before sentencing Petitioner the next day. (*Id.* at 167-68.)

The following day, prior to sentencing, Novak renewed his request for a continuance to obtain the testing recommended by Dr. Potts; to refute the prosecution's suggestion that Petitioner's head injuries and childhood abuse were wholly unsubstantiated. Novak proffered some of Petitioner's military medical records documenting Petitioner's head injury while he was in the Marines. (RT 12/9/93 at 6-8, 10-11.) The trial court admitted the records, but denied the renewed request for a continuance, stating that:

> I have read the case cited by both the State and defense, and also reviewed Dr. Potts' report. What Dr. Potts said in his report is that he believes that the defendant had head trauma which increases the potential for neurologic sequela contributing to his behavior. And at the hearing yesterday, my

> recollection is he was assuming based on the allegation that the defendant had fallen from a roof and hit his head, plus other allegations about head injuries, that he had mild trauma which increased the potential for aggravating the substance abuse. That's a long shot away, far away in both in speculation and in fact from what's alleged to have occurred in [*State v. Stuard*, 176 Ariz. 589, 863 P.2d 881 (1993)].
>
> This case has been pending a long time, and I think the evidence is very slim, nonexistent, in fact, that the defendant has anything that requires any kind of neurological examination. So, I am ready to proceed.

(*Id.* at 16-17.)

In sentencing Petitioner, the trial court found three aggravating factors as to both murders: that they were committed (1) for pecuniary gain, (2) in an especially heinous, cruel, or depraved manner, and (3) during the commission of one or more other homicides. (ROA 117, 118.) With respect to Tisha's murder, the court found a fourth aggravating factor based on her age. (ROA 117.) The court rejected Petitioner's testimony that Sperlazzo killed Tisha, concluding that Petitioner had "manufactured this tale" and that "[i]n the past [Petitioner] has shown that he is willing to lie if it benefits him." (ROA 117 at 4.) The court found no statutory mitigating circumstances with respect to either murder, but found several non-statutory factors: that Petitioner (1) suffered from long-term substance abuse, (2) was

under the influence of alcohol and drugs at the time of the offense, (3) had a chaotic and abusive childhood, and (4) that his substance abuse problem might have been caused by genetic factors and aggravated by head trauma. (ROA 117, 118.) With respect to each murder conviction, the court found that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances or to call for leniency and sentenced Petitioner to death for each of the murders. (*Id.*) The Arizona Supreme Court affirmed the convictions and sentences on direct appeal. *State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996).

2. Post-conviction proceedings

Petitioner sought post-conviction relief ("PCR") from the trial court. In his PCR petition, he alleged that his counsel was ineffective at sentencing for failing to obtain a defense mental health expert, failing to timely seek neurological and neuropsychological testing, and failing to present additional evidence of Petitioner's abusive childhood, head trauma, and drug abuse; these allegations correspond, respectively, to Claims 20(O), (P) and (T) in the amended habeas petition. On April 4, 2000, the PCR court held an evidentiary hearing on Claims 20(P) and (T), but denied a hearing on Claim 20(O). At the hearing, Randy Jones and Petitioner's mother testified, as did trial counsel Novak. Jones testified that he first spoke with Novak in July 1992 by telephone, talked with him again in October 1992, when Novak and Ms. Carty visited the family in Nevada, and spoke a third time just prior to

sentencing in December 1993. (RT 4/4/00 at 10, 11, and 15.) During these conversations, Jones provided background information about Petitioner's childhood, head injuries, and history of drug abuse and treatment. (*Id.*) Mrs. Jones testified that she informed Novak about the details of Petitioner's difficult birth, his head injuries, his drug use, which began at approximately age thirteen, and the physical abuse he suffered from his first stepfather. (*Id.* at 26-36.) She also testified that she told Novak that after she married Mr. Jones, Petitioner "had a normal childhood as far as school, baseball," and that they "had a good home life." (*Id.* at 29.) Novak testified that he began work on Petitioner's defense immediately, and that one of the tasks undertaken by Ms. Carty was to develop Petitioner's life history. (*Id.* at 53-54.) He testified that he considered Dr. Potts "part of the defense team." (*Id.* at 102.) He conceded, however, that if he were trying the case today he would immediately seek the appointment of a mitigation specialist. (*Id.* at 51.) He also testified that he only considered the need for a neurological exam after Dr. Potts testified at the sentencing hearing. (*Id.* at 99.)

In its written order, the PCR court denied relief on Claim 20(O) without explanation or factual findings. (ROA-PCR 59 at 2.) With respect to Claims 20(P) and (T), the PCR court stated:

> With regard to Claim 24I[6], petitioner alleges that trial counsel was ineffective at sentencing by failing "... to recognize the need for neurological and psychological testing ..."

The report and testimony of Dr. Potts who was appointed by the Court, adequately addressed defendant's mental health issues at sentencing.

...

In Claim 24I(7), petitioner alleges that "Trial counsel failed to present meaningful additional witnesses and available evidence to support Jones' proposed mitigation."

Testimony at the hearing showed that counsel presented the available witnesses and evidence to support mitigation. The additional witnesses and evidence suggested by petitioner would have been redundant.

The Court finds that the petitioner has not met its [sic] burden of proof of showing deficient performance by trial counsel.

(ROA-PCR 73 at 2-3). The PCR court's ruling is the only "reasoned" state court decision regarding Claims 20(O), (P), and (T). The Arizona Supreme Court summarily denied the petition for review.

EVIDENCE DEVELOPED IN THE HABEAS PROCEEDINGS

Petitioner has presented expert testimony, based upon, inter alia, the results of neuropsychological

testing, suggesting that Petitioner suffers from several psychological conditions: cognitive disorder or impairment; post-traumatic stress disorder (PTSD); poly-substance abuse; attention deficit hyperactivity disorder (ADHD); and a mood disorder. Respondents have countered with expert testimony indicating that the test results and the record as a whole do not support diagnoses of cognitive disorder, PTSD, or a mood disorder. Petitioner's experts further ascribe as a cause of Petitioner's alleged cognitive disorder or impairment a series of head injuries that occurred with some regularity throughout Petitioner's life prior to the date of the instant offenses.

1. Petitioner's witnesses

At the evidentiary hearing three mental health experts testified for Petitioner: Dr. Potts; Dr. Pablo Stewart, a psychiatrist; and Dr. Alan Goldberg, an attorney and neuropsychologist. Petitioner's trial counsel, Lee Novak, also testified. Their findings and testimony can be summarized as follows.

Dr. Potts: As discussed above, Dr. Potts performed a court-ordered psychiatric evaluation of Petitioner in November 1993. (Ex. 23.) At the evidentiary hearing, Dr. Potts testified that he had been appointed as an independent expert (RT 3/21/06 at 13); that he was not a mitigation specialist and did not undertake an adequate mitigation investigation but instead performed only a "cursory examination" to obtain a "gross overview" of Petitioner's condition (*Id.* at 32, 92); and that he had urged Mr. Novak to obtain neuropsychological as well as neurological testing of

Petitioner (*Id.* at 60-61). Dr. Potts acknowledged that when he prepared his report and testified at Petitioner's sentencing hearing he had obtained background information from Petitioner's parents. (*Id.* at 52-53.) His report included a "societal and developmental history," which set out information about Petitioner's childhood abuse by his first stepfather, his head injuries and extensive drug abuse, and the role genetic-loading played in Petitioner's mental-health difficulties. (Ex. 23 at 2-3.) All of these were factors that the trial court determined to be mitigating. (ROA 117, 118.)

Dr. Potts acknowledged that he did not diagnose Petitioner with PTSD, or even discuss the condition, although as a psychiatrist he was qualified to make such a diagnosis. (RT 3/21/06 at 66-69.) Dr. Potts further acknowledged that Petitioner, whose memory was intact, did not provide any information regarding physical abuse by Randy Jones or head injuries resulting from car accidents. (*Id.* at 79-80.) Finally, Dr. Potts did not note any "gross" or "obvious" cognitive deficits (*Id.* at 49), and estimated that Petitioner's IQ was in the normal range (*Id.* at 49-50,; Ex. 23 at 3).

Dr. Stewart: Dr. Stewart evaluated Petitioner in March 2002 and testified on his behalf at the evidentiary hearing. In his declaration and testimony, Dr. Stewart concluded that Petitioner suffers from cognitive dysfunction; PTSD; poly-substance abuse, which Dr. Stewart described as a product of genetic predisposition and self-medication; and mood disorder NOS (not otherwise specified).

(Ex. 1; RT 3/21/06 at 172.)

Dr. Stewart reached his conclusion that Petitioner suffers from cognitive impairment based primarily upon two pieces of data: the low scores Petitioner achieved on standardized tests from the eighth grade (RT 3/21/06 at 175-76), and the results of neuropsychological testing performed by Dr. Goldberg, specifically the gap between Petitioner's performance and verbal IQ scores (*Id.* at 177). With respect to Petitioner's performance on standardized tests, however, Dr. Stewart acknowledged that absenteeism and drug use could have contributed to Petitioner's low scores. (*Id.* at 211-14.)

Dr. Stewart also offered his opinion regarding the causes of Petitioner's cognitive impairment, among which Dr. Stewart listed pre-natal exposure to chrome, caffeine, and nicotine; childhood physical, sexual, and mental abuse, including emotional and physical abuse by Randy Jones; and cumulative head injuries. (Ex. 1 at 21-27; RT 3/21/06 at 178-87.) However, as Dr. Stewart conceded, the record contains contradictory information regarding many of these circumstances. For example, Petitioner's mother reported that, while Petitioner's birth was difficult, he was delivered full-term, weighing seven pounds seven ounces, and thereafter developed normally. (RT 3/21/06 at 208-09; *see* Ex. 56, Interview with Peggy and Randy Jones, 12/3/01 at 6.) The record also includes inconsistent information with respect to Randy Jones's treatment of Petitioner and other family members. While Dr. Stewart reports that Jones was extremely abusive, both

mentally and physically, to the entire household, elsewhere Petitioner had reported that he came from a good family and was not abused (Ex. 26) and characterized Jones as his "real dad, ... the only one that has treated me good. He has never hit me or anything." (Ex. 14). Similarly, Petitioner's mother described Randy Jones as controlling but not physically abusive. (Ex. 56, Interview with Peggy Jones, 12/10/01 at 2, 4, 10, 11.)

Finally, as Dr. Stewart acknowledged, there is no documentation to support Petitioner's claims of multiple head injuries. (See RT 3/22/06 at 233-34.) With the exception of the 1983 "mugging," no medical records exist regarding any of the incidents, and the only source corroborating Petitioner's self-report is his mother's account of three head injuries Petitioner suffered as a child and adolescent. Moreover, although Petitioner has described the 1983 incident as a beating in which he was struck with a two-by-four, suffered convulsions, remained unconscious for three days (*see, e.g.*, Ex. 12 at 2), and was "almost killed" (Ex. 53 at 3), contemporaneous medical records present a very different account. The records indicate that Petitioner was hospitalized for two days after being found lying unresponsive. (Ex. 15.) Petitioner was intoxicated; there "was no apparent accident involved." (*Id.*) Initially, Petitioner "appeared to be sleeping" and responded only to physical stimuli; however, after receiving Narcon, a medication that counteracts the effects of intoxication, he responded to questions, denying that he felt any local pain and admitting that he had consumed "many beers." (*Id.*) He exhibited "no

apparent trauma," and his head was "atraumatic." (*Id.*) Further examination revealed only a "minor abrasion and a tender area over the right parietal scalp." (*Id.*) The results of neurological exams were "normal." (*Id.*) His discharge diagnosis listed "head trauma," "alcohol intoxication," and "resolved apparent concussion." (*Id.*) Significantly, Petitioner's medical records further reveal that during his subsequent treatment for alcohol abuse, his "[c]ognitive testing was normal." (*Id.*; *see* RT 3/23/06 at 401.)

Dr. Stewart also concluded that Petitioner suffers from PTSD. In his report, Dr. Stewart discussed only the first of the four criteria that must be satisfied to reach a diagnosis of PTSD according to the DSM-IV; i.e., that Petitioner had experienced a traumatic event, having witnessed and been the victim of abuse during his childhood.[FN5] (Ex. 1 at 27; *see* RT 3/22/06 at 237.) In his testimony, however, Dr. Stewart insisted that Petitioner also met the remaining criteria-re-experiencing of the trauma, avoidance, and hyperarousal. (RT 3/22/06 at 240.) Although he did not attempt to determine whether Petitioner experienced these conditions at the time of the murders, Dr. Stewart testified that the effects of PTSD were present in all aspects of Petitioner's life. (RT 3/22/06 at 237-43.) Thus, according to Dr. Stewart, Petitioner was "acting under the effects of PTSD" when he beat Weaver and Ms. Gumina to death with a baseball bat. (Ex. 1 at 32.) Dr. Stewart also adopted Dr. Foy's conclusions regarding PTSD.[FN6] As Respondents note, however, it is unclear whether Dr. Foy actually diagnosed

Petitioner with PTSD; for example, in his report he described his finding as "probable chronic PTSD" (Ex. 5 at 10), and in his deposition Dr. Foy characterized his opinion only as suggesting that "there's a very high probability that [Petitioner] would be diagnosed by anyone with PTSD" (RT 3/22/06 at 247-48). Finally, Dr. Stewart acknowledged that Petitioner's conduct at the time of the murders could also be attributed to substance abuse, and that he could not determine the degree to which Petitioner's behavior was the result of PTSD as opposed to the use of methamphetamine and alcohol. (RT 3/22/06 at 243-44.)

FN5. "DSM-IV" refers to the Diagnostic & Statistical Manual of Mental Disorders (4th ed. 1994).

FN6. Two of Petitioner's experts prepared reports but did not testify at the evidentiary hearing: psychologist David Foy and neuropsychologist Shoba Sreenivasan. Dr. Foy conducted a psychosocial history and evaluation of Petitioner. (Ex. 5.) He concluded that Petitioner suffers from PTSD, Polydrug Abuse, Depressive Disorder, as well as compromised cognitive and emotional functioning and learning deficits. (*Id.*) Dr. Sreenivasana did not perform any tests but prepared a report, based upon his review of the record and Dr. Goldberg's test results, concluding that Petitioner suffered from long-term poly-substance abuse as well as compromised cognitive functioning due to

> early onset of substance abuse and the cumulative impact of repeated head traumas. (Ex. 8.)

Dr. Stewart also diagnosed Petitioner with a mood disorder NOS. (Ex. 1 at 24.) This diagnosis is based upon Petitioner's mental-health history, which includes a suicide attempt, psychiatric treatment using the drug lithium, and Arizona DOC records indicating that Petitioner was diagnosed with a bipolar disorder and treated with mood-stabilizing drugs and anti-psychotics. (RT 3/21/06 at 201-06.) Dr. Stewart acknowledged, however, that Petitioner's DOC records discuss Petitioner's depressive symptoms but include no direct indications that Petitioner exhibited symptoms of mania. (*Id.* at 260.)

Also included in Dr. Stewart's declaration is information detailing Petitioner's allegation that he had been sexually assaulted by his grandfather. (Ex. 1 at 15, 22.) The source of this information is Dr. Foy's report, which indicates that Petitioner suffered severe sexual abuse for a period of five years, from age nine to fourteen. (RT 3/22/06 at 234.) However, Randy Jones and Petitioner's mother "never saw any indication that [Petitioner] may have been sexually abused by anyone, nor were they aware of any sexual perpetrators in the family." (Ex. 56, Interview with Peggy and Randy Jones, 12/10/01 at 6.) Dr. Stewart conceded that the information concerning sexual abuse was most likely based upon Petitioner's self-report to Dr. Foy. (RT at 3/22/06 at 234-35.)

Finally, in his declaration Dr. Stewart concluded that, "The result of these mental illnesses, biological, environmental, social and other compromising factors, culminated in, at the time of the murder, an impairment in Danny's capacity to appreciate the wrongfulness of his actions and/or to conform his conduct to that required by law."[FN7] (Ex. 1 at 32.)

FN7. In the Conclusions Section of his declaration Dr. Stewart went even further, including a paragraph endorsing Petitioner's account of the crimes. (Ex. 1 at 31-34.) According to Dr. Stewart, "Danny's psychological profile supports the events as described by Danny on the night of the crimes, including Frank's responsibility for Tisha Weaver's murder." (*Id.* at 33.) In assessing Dr. Stewart's credibility, the Court takes into account his willingness to present an opinion on a factual issue which concerns only the guilt phase of the trial and which was resolved, with a result contrary to that reached by Dr. Stewart, by the jury, the trial court, and the Arizona Supreme Court.

The Court also takes note of Dr. Stewart's reliance on the following factors to support his assertion that Petitioner did not kill Tisha. First, Dr. Stewart explains, without reference to corroborating sources, that Petitioner "was by all accounts a good step-father and is now a good father." (*Id.* at 32.) Dr. Goldberg reports, by contrast, that Petitioner "had a child with a girlfriend

> subsequent to his divorce. This child is now 9 years old, and he has never met her." (Ex. 12 at 2.) Second, Dr. Stewart states that he believes Petitioner's version of his activities on the night of the murders because Petitioner "has a history of submissive, almost child-like behavior, against older males." (Ex. 1 at 32-33.) Yet in the same section of his declaration, Dr. Stewart observes that Petitioner "at least twice in his young life defended himself in a life-threatening situation with a baseball bat." (*Id.* at 32.) In these instances, Petitioner is alleged to have responded to abuse from adult males not in a submissive manner but by confronting them and threatening them with violence.

Dr. Goldberg: Dr. Goldberg performed a neuropsychological evaluation of Petitioner in February 2002 and testified at the evidentiary hearing. In his declaration, Dr. Goldberg offered "diagnostic impressions" of "attention deficit disorder and learning disability." (Ex. 12 at 7; *see* RT 3/22/06 at 303.) These impressions are based upon the results of neuropsychological examinations, including, most significantly, the difference in Petitioner's performance and verbal IQ scores as well as subtest "scatter" within test results from each category. (*See* RT 3/22/06 at 284-85.) Dr. Goldberg testified that such scatter is seen in only five percent of the population. (*Id.* at 284, 338.) Dr. Goldberg further noted a "significant change" for the worse in Petitioner's grades from the first to the eighth grade.

(*Id.* at 284.) According to Dr. Goldberg, a bipolar disorder "can also be diagnosed," as well as "[s]ome 'soft' neurological signs" that might be "sequelae of repeated blows to the head." (Ex. 12 at 7.) Based upon these impressions, Dr. Goldberg opined, with respect to the issue of premeditation, that "it is unlikely that this man would've been capable of violent acts without the influence of drugs and alcohol" and that "[t]his would be quite different from methodically carrying out criminal activity with intention, and after reflection." (*Id.* at 8.)

In his testimony, Dr. Goldberg acknowledged that many of Petitioner's scores on the neuropsychological tests were in the average or above-average range (RT 3/22/06 at 309-14, 321-23); that Petitioner's full-scale IQ score-97-is normal (*Id.* at 321); that the decline in Petitioner's grades from elementary to high school could be attributable to drug use, absenteeism, and lack of interest as well as to cognitive impairment (*Id.* at 334-35); that, with the exception of the "mugging" while Petitioner was in the Marines, there was no medical documentation of any of Petitioner's reported head injuries, and that the information that Petitioner had been unconscious for three days after the "mugging" was based upon his self-report rather than the contemporaneous records of the incident (*Id.* at 330-34). Dr. Goldberg also acknowledged that, despite the voluminous record documenting the extensive efforts to evaluate Petitioner's mental status, and despite the recommendations from Dr. Potts in 1993 and from Dr. Goldberg in 2002, he, Dr. Goldberg, was not aware that Petitioner had ever been subjected to any neurological testing. (*Id.* at

336-37.) Dr. Goldberg also conceded that Petitioner's rating of "severely depressed," as scored on the Beck Depression Inventory, might reflect a normal emotional response to life as a death row prisoner. (*Id.* at 319.)

Lee Novak: Trial counsel Novak testified that he did not seek appointment of a mitigation specialist. (RT 2/21/06 at 107.) According to Novak, at the time of Petitioner's trial, it was not "common practice" in Mohave County to employ a mitigation expert, and in any case there was no funding available for such an appointment. (RT 3/21/06 at 150.) He indicated, however, that co-counsel, Ms. Carty, and his investigator, Austin Cooper, gathered information about Petitioner's background. (*Id.* at 107-08.) He testified that funding through the Public Defender's Office was limited and that his superior advised him to seek funding for experts from the trial court. (*Id.* at 110.) As a result of Novak's requests, the court authorized limited funding for a crime-scene investigator and for Dr. Sparks, the addictionologist who testified at the guilt stage of trial. (*Id.* at 110-14.)

Novak also testified that Dr. Potts, although appointed and funded by the trial court, in fact served as the equivalent of Petitioner's mitigation specialist. Novak explained that Dr. Potts "did not act as a neutral, detached court-appointed expert." (RT 3/21/06 at 121.) Instead, Dr. Potts "indicated that his role was going to be to help us." (*Id.*) In fact, Dr. Potts "actively assisted developing mitigation, planning strategy" (*Id.*); he urged Novak to move for

a continuance for additional neurological testing, and advised Novak to cite the case of *State v. Stuard*, 176 Ariz. 589, 863 P.2d 881 (1993) in support of the motion (*Id.* at 123). According to Novak, his discussion of strategy with Dr. Potts the night before Dr. Potts testified at the sentencing hearing "was more like meetings I've had since with aggravation/mitigation experts who are part of our defense team." (*Id.* at 122-23, 125.)

2. Respondents' witnesses

Respondents called three experts to testify at the evidentiary hearing: Dr. Steven Herron, a psychiatrist formerly employed by the Department of Corrections; Dr. Anne Herring, a neuropsychologist; and Dr. John Scialli, a psychiatrist. Their findings and testimony can be summarized as follows.

Dr. Herron: Dr. Herron treated Petitioner from 2003 to 2005. The treatment consisted primarily of the management of Petitioner's medication. (RT 3/23/06 at 362, 374.) Based upon a working diagnosis of bipolar disorder, Dr. Herron treated Petitioner for depression and anxiety. (*Id.* at 363-64.) Dr. Herron stated that both depression and anxiety are common among death-row inmates. (*Id.* at 364.) He testified that he believed the diagnosis of bipolar disorder was reasonable, although he did not observe any manic or hypomanic episodes. (*Id.* at 363.) Finally, Dr. Herron detected no signs of neurological dysfunction, cognitive impairment, or PTSD, though he could not rule those conditions out. (*Id.* at 366-68, 375-76.)

Dr. Herring: Dr. Herring, a clinical neuropsychologist, interviewed and tested Petitioner and prepared a report dated November 2, 2005. (Ex. 51.) Based upon the results of the tests she performed and her review of test results obtained by Dr. Goldberg, Dr. Herring concluded that Petitioner does not suffer from cognitive impairment or ADHD. (*Id.* at 7-8; *see* RT 3/23/06 at 443.)

Dr. Herring did not repeat the tests Dr. Goldberg administered on which Petitioner performed in the average or above-average range. (RT 3/23/06 at 404-05.) She administered tests designed to measure "executive function"; according to Dr. Herring, the results of such tests would indicate whether Petitioner suffers from "even subtle cognitive dysfunction as a result of head injuries." (*Id.* at 405.) On two of these tests, the Category Test and the Wisconsin Card Sorting Test, Petitioner performed in the "well above average range." (Ex. 51 at 6.) On tests implicating another category of executive functioning ("working memory/divided attention"), Petitioner scored in the low-average to average range, with one exception. (RT 3/23/06 at 408-11, 431; Ex. 51 at 6-7.) On that test, Petitioner scored in the borderline-impaired range for shorter delay intervals. (*Id.*) However, his performance improved to the average range for the longer, more difficult delay intervals, suggesting to Dr. Herring that Petitioner's "attention and working memory really are intact." (RT 3/23/06 at 431.)

On other tests measuring memory, Petitioner's performance "fluctuated somewhat but revealed

largely intact abilities." (Ex. 51 at 5.) Petitioner's scores were lower on tests measuring immediate as opposed to delayed recall. (*Id.*; RT 3/23/06 at 413-16; Ex. 12.) According to Dr. Herring, this "atypical presentation," by which Petitioner was able to recall information more successfully after a delay, is inconsistent with memory loss due to brain injury and may indicate that Petitioner experienced anxiety or was distracted during the testing. (RT 3/23/06 at 415-16.) On tests measuring attention, Petitioner scored in the average to very superior range, with one exception, a test administered by Dr. Goldberg but "not compared to any norms." (*Id.* at 421.) While acknowledging that these tests are not "differentially diagnostic" of ADHD, Dr. Herring testified that the results Petitioner achieved are not consistent with a diagnosis of attention deficit. (*Id.* at 423.) In this context Dr. Herring also noted that there was nothing in the record suggesting that Petitioner displayed symptoms of ADHD prior to the age of seven, one of the criteria for a diagnosis of ADHD; to the contrary, the record indicated that Petitioner was a good student and that his teachers "loved" him, the latter not being a phenomenon characteristic of children with ADHD.[FN8] (*Id.*)

> FN8. The record indicates that Petitioner's parents "did not consider him to have any periods of hyperactivity." (Ex. 56, Interview with Peggy and Randy Jones, 12/3/01 at 11.)

To supplement the testing performed by Dr. Goldberg and to measure additional aspects of Petitioner's executive ability, Dr. Herring

administered a series of subtests of the Delis-Kaplan Executive Functioning System. (RT 3/23/06 at 434-35.) To measure cognitive flexibility, Dr. Herring administered the Verbal Fluency and Design Fluency tests. On the former, analogous to the Controlled Word Association Test administered by Dr. Goldberg on which Petitioner achieved low-average scores, Petitioner's scores were all in the average range. (*Id.* at 436.) On the latter, Petitioner's scores were in the average to high-average range. (*Id.*) On a test designed to measure "inhibitory capacity" and "impulse control," Petitioner performed in the borderline-impaired range; however, in another test measuring the same domain, Petitioner's score placed him in the high-average range. (*Id.* at 436-37; Ex. 51 at 7.) With respect to the latter test, Dr. Herring testified that it was significant that in completing the test Petitioner obeyed all of the rules; Dr. Herring noted that subjects with ADHD or frontal lobe damage find it difficult to perform the test without breaking the rules. (*Id.* at 437; Ex. 51 at 7.) To measure Petitioner's verbal thinking and abstract reasoning abilities, Dr. Herring administered a "proverb-interpretation" test, on which Petitioner scored in the high-average range. (*Id.*)

Petitioner's scores on achievement tests administered by Dr. Goldberg ranged from low average (math) to average (spelling) and high average (passage comprehension). (*Id.* at 425.) On reading tests administered by Dr. Herring, Petitioner performed at the average level when compared with his age peers and the low-average

level in comparison with his education peers. (Ex. 51 at 6; RT 3/23/06 at 433.) His math performance was in the lower half of the average range with respect to his age peers and in the borderline and low-average range with respect to his education peers. (*Id.*)

On tests assessing visuospatial organization and construction, administered by Dr. Goldberg, Petitioner's performance was superior. (Ex. 51 at 5; RT 3/23/06 at 426.) Dr. Herring administered a test requiring Petitioner to copy a complex drawing and then draw it from memory. Petitioner's performance in copying the figure was moderately impaired but did not "suggest that there was a major distortion in his visuospatial processing." (RT 3/23/06 at 432.)

On tests measuring sensory and motor abilities, Petitioner performed in the average range for fine motor speed and manual dexterity but in the borderline-impaired range on the TPT, a "complex perceptual motor task." (*Id.* at 5-6; RT 3/23/06 at 427-29.) The latter test measures several cognitive domains, including memory and speed of information-processing, as well as tactile perception. (*Id.* at 428.) Taking into account Petitioner's performance on other tests measuring cognitive ability, Dr. Herring opined that Petitioner's low score on the TPT reflected a difficulty with his tactile perceptual abilities rather than a problem with processing information. (*Id.*)

In her testimony Dr. Herring addressed the bases for Dr. Goldberg's conclusion that Petitioner suffers from cognitive deficiency. She explained that a

child's grades in school can be affected by a variety of factors unrelated to cognitive ability. (RT 3/23/06 at 391-92.) She further noted that Petitioner's scores on his eighth grade standardized achievement tests, which placed him in the average or low-average range (*Id.* at 393), were not low enough to meet the definition of cognitive impairment (*Id.* at 400).

With respect to the gap in Petitioner's performance and verbal IQ scores, Dr. Herring testified that such a disparity, while significant, is not "uncommon," with eighteen-point or greater disparities in scores occurring in "ten percent of normal people." (*Id.* at 418.) More importantly, Dr. Herring noted that Petitioner's higher score occurred on the performance subtest, which measures speed and is "sensitive to any disorder that impairs mental processing," whereas his lower score occurred on the verbal subtest, which, to a greater extent than performance IQ, "assesses past learned information." (*Id.*) Therefore, according to Dr. Herring, "the fact that [Petitioner] did so much better on the performance IQ than the verbal IQ is probably more suggestive of the fact that he did not do well in school than that he is cognitively impaired, which would tend to slow people up, slows their processing speed and slows their memory." (*Id.* at 418-19.)

Finally, in addition to neuropsychological tests, Dr. Herring, like Dr. Goldberg, administered the Beck Depression Inventory II. (*Id.* at 442.) Petitioner's score placed him "in the range of normal mood." (*Id.*) This represents a stark contrast with the result reported by Dr. Goldberg, who, as noted above, found

Petitioner to be severely depressed.

Although Petitioner's test results included a few scores in the impaired range on individual tests or subtests, Dr. Herring explained that these low scores were "outliers"; they could not form the basis for a finding of cognitive disorder because they did not consistently occur in any one cognitive domain. (*Id.* at 470-72, 478-79.) Dr. Herring observed that, given the number of tests Petitioner was subjected to, sixty percent of the population would have two or more test scores in the impaired range. (*Id.* at 470.)

Dr. Scialli: Dr. Scialli examined Petitioner on October 28, 2005, and prepared a "Psychiatric Examination Report to Determine Mental State at Time of Alleged Offense," dated November 10, 2005. (Ex. 53.) Dr. Scialli testified that, based on his psychiatric evaluation of Petitioner and a review of all the records, he could diagnose Petitioner as suffering from the following conditions at the time of the murders: alcohol, amphetamine, and cannabis dependence, and ADHD, residual type. (RT 3/23/06 at 511.)

Dr. Scialli disputed the diagnoses of Petitioner's experts. He disagreed with the diagnosis of PTSD, observing that Petitioner's experts based their conclusions exclusively on a finding that Petitioner had experienced a traumatic event; they did not, according to Dr. Scialli, consider the remaining factors necessary to complete a diagnosis of PTSD. (RT 3/23/06 at 496-99.) Dr. Scialli further noted that during his examination of Petitioner there was no

indication that Petitioner had "re-experienced" the traumatic event at the time of the murders. (*Id.* at 499.)

Dr. Scialli testified that none of the experts had diagnosed Petitioner with cognitive disorder as defined by the DSM-IV. (*Id.* at 500.) Dr. Scialli explained that phrases such as "cognitive dysfunction" or "cognitive impairment" are not diagnostic definitions but instead are used "idiosyncratically" as "terms of art" with no fixed meaning (*Id.* at 499-500.) According to Dr. Scialli, Petitioner could not be classified under any of the categories of cognitive disorder established by the DSM-IV; i.e., no expert had diagnosed Petitioner with delirium, dementia, amnesiac disorder, or with cognitive disorder NOS. (*Id.* at 500-02.)

Dr. Scialli also concluded that Petitioner did not suffer from bipolar disorder. Most significant to this finding was the absence of evidence of manic or hypomanic symptoms. (*Id.* at 504.) Dr. Scialli testified that Petitioner's description of his "highs and lows" "sounded like having an average day as opposed to a down-and-out day, and that's not mania or hypomania." (*Id.*) In addition, the fact that Petitioner was prescribed, and responded positively to, lithium, did not indicate to Dr. Scialli that Petitioner suffers from bipolar disorder, because the drug is successfully used to treat a number of other conditions. (*Id.* at 502-03.)

Dr. Scialli diagnosed Petitioner with residual symptoms of ADHD. (*Id.* at 504-05.) He testified,

however, that there is no link between ADHD and violent behavior. (*Id.* at 505.) He further testified that, had he been aware of Dr. Herring's testimony on the issue of ADHD before he prepared his report, he might have "come to a different conclusion." (*Id.* at 512.) In any event, the presence or absence of ADHD, residual type, is, in Dr. Scialli's opinion, a "very minor point," because the condition is not related to the offenses. (*Id.*)

Finally, Dr. Scialli's report discusses the impact of the new evidence obtained during the habeas proceedings on the issues raised in Petitioner's claims. (Ex. 53 at 8-10.) First, Dr. Scialli found that Dr. Potts was qualified to evaluate Petitioner for neurological disorders and organic mental illness. (*Id.* at 8.) Dr. Scialli also testified that Dr. Potts's call for "sophisticated neurological testing" could not have been interpreted as a request for a neuropsychological examination. (RT 3/23/06 at 496.) Dr. Scialli also opined that the neuropsychological testing performed during these habeas proceedings fails to provide any information in addition to that which was included in Dr. Potts's 1993 report and testimony at sentencing. (Ex. 53 at 8.) Dr. Scialli also wrote and testified that Petitioner's experts failed to establish a stronger nexus between Petitioner's alleged disorders and the murders than the connection made by Dr. Potts at sentencing. (*Id.*)

3. Findings based on the new evidence

Faced with conflicting diagnoses resulting from a "latter day battle of the experts," *Sims v. Brown*, 425 F.3d 560, 584 (9th Cir.2005), the Court necessarily takes into account the credibility of the parties' witnesses. *Cf. Ford v. Wainwright*, 477 U.S. 399, 415, 106 S.Ct. 2595, 91 L.Ed.2d 335 (explaining the value of cross-examination in assessing "inconsistent" psychiatric evidence). Testimony elicited during the hearing indicated that Dr. Stewart's forensic work is done "primarily for the defense" (RT 3/22/06 at 231-32), and that Dr. Goldberg has never been retained by the prosecution in a capital case and presently has a "working relationship" with the Federal Public Defender's Office (*Id.* at 306). By contrast, Drs. Herring and Scialli have offered testimony on behalf of both the State and criminal defendants or habeas petitioners, with Dr. Scialli having been retained with equal frequency by the defense and the prosecution.[FN9] (*Id.* at 388-89, 486.) With these considerations in mind, the Court makes the following findings regarding the factual bases of Petitioner's claims of IAC at sentencing.

> FN9. In previous appointments Drs. Herring and Scialli addressed some of the key issues present in Petitioner's case. Dr. Herring testified on behalf of the petitioner in *Correll v. Stewart*, 2-CV-87-1471-PHX-SMM. At an evidentiary hearing on Correll's IAC claim, Dr. Herring testified that neurological testing indicated that Correll suffered from brain dysfunction, problems with impulse control, and possible prefrontal lobe impairment. (*See* Mem. of Decision and Order dated 3/5/03.) In

> *State v. Stuard*, 176 Ariz. 589, 608, 863 P.2d 881, 900 (1993), Dr. Scialli, although retained by the State, testified that the defendant's boxing career could have caused brain damage and that the resulting mental impairment was causally related to the murders; according to Dr. Scialli, Stuard, suffering from dementia, "reacted suddenly and overwhelmingly when he confronted and was confronted by his victims." *Id.* at n. 12.

Cognitive impairment.[FN10] The Court finds that Petitioner has not shown that he suffers from cognitive impairment. This finding is based upon the reports and testimony of Drs. Herring and Scialli, the test results offered by both parties, and the Court's review of the entire record.

> FN10. The Court uses the term cognitive "impairment" as synonymous with "dysfunction," recognizing both as terms of art describing a condition distinct from cognitive disorder, a condition recognized by the DSM-IV but which none of the experts diagnosed in Petitioner.

Petitioner has not presented persuasive evidence regarding either the existence or the cause of his alleged cognitive impairment. In making their diagnosis of cognitive impairment, Petitioner's experts relied upon Petitioner's school performance, both his grades and his scores on standardized tests; the discrepancy in his performance and verbal IQ scores; and the results of other neuropsychological

tests. As discussed above, alternative explanations exist with respect to Petitioner's declining school performance, including absenteeism, family stresses, substance abuse, and lack of motivation. Moreover, as Dr. Herring testified, Petitioner's standardized test scores were within the average range and do not, by themselves, suggest impairment. The gap between Petitioner's IQ scores, while notable, is not uncommon, and the fact that Petitioner scored higher on the performance subtest militates against a finding of impairment, as does the fact that Petitioner's overall IQ is solidly in the average range. Finally, in the vast majority of instances Petitioner's scores on neuropsychological tests were in the average range or above. The few scores that fell in the impaired range did not implicate any particular cognitive domain, suggesting that they were aberrations and not indicative of impairment.

The experts ascribed as the primary cause of Petitioner's cognitive impairment a series of head injuries. With the exception of the 1983 "mugging," there is no medical documentation to corroborate any of these injuries. In addition, the dates and details-and even the occurrence-of the injuries, as reported by Petitioner and his family, are inconsistent and hence difficult to credit. [FN11] This difficulty is compounded by the contrast between Petitioner's account of the 1983 incident, in which he was mugged, struck by a two-by-four, and left unconscious for three days, and the contemporaneous medical records, which indicate that Petitioner was discovered passed out or asleep from the effects of intoxication, that he responded upon being

administered medication that counteracted those effects, that he suffered no neurological damage and his only injury was a small abrasion, and that if he suffered a concussion it was "resolved" upon his discharge. In any event, even if Petitioner's self-reported head injuries did occur, they did not, as discussed above, result in cognitive impairment.

> FN11. A complete list of the head or brain injuries alleged by Petitioner and referred to in the record includes, in chronological order: prenatal exposure to neurotoxins in Petitioner's mother's workplace (*see, e.g.*, Ex. 1 at 25); beatings of his pregnant mother by his father (*Id.* at 7); strangulation by the umbilical cord while in utero and injuries from use of forceps at delivery (*Id.* at 7, 13); beatings to the head at age three by Petitioner's first stepfather (*Id.* at 8-9; Ex. 8 at 2); a fall off a slide (or a blow from his stepfather) at age five-and-half, six, or seven, which left Petitioner unconscious for "approximately twenty minutes" (Ex. 51 at 2; *see, e.g.*, Ex. 1 at 9, 21); a motor vehicle accident at age ten which left Petitioner unconscious (Ex. 53 at 2); a fall from a roof at age nine, ten, eleven, or thirteen, which rendered Petitioner unconscious for a "couple of minutes" (Ex. 53 at 3) or five minutes to ten minutes (Ex. 1 at 14), or did not result in loss of consciousness (Ex. 51 at 2); another fall, off a second-floor scaffold or roof, at age fifteen or sixteen, leaving Petitioner unconscious for three or four minutes (*see, e.g.*, Ex. 53 at 4) or not

resulting in unconsciousness (Ex. 51 at 2); a fight in high school in which Petitioner was "knocked out" (Ex. 8 at 2; Ex. 12 at 2); the 1983 "mugging" (*see, e.g.*, Ex. 12 at 2); a fight at a wedding in 1985, which left Petitioner unconscious for "more than five minutes" (Ex. 53 at 4); "at least" three car accidents as an adolescent or young adult, all producing head injuries and unconsciousness (Ex. 1 at 21); and fights in Nevada bars (*see, e.g.*, Ex. 12 at 2).

Post-traumatic Stress Disorder: The Court finds that Petitioner has not shown that he suffered from PTSD at the time of the murders. The Court reaches this conclusion based upon the fact that none of Petitioner's experts completed an appropriate diagnosis using all of the criteria set forth in the DSM-IV; instead, their reports focused simply on the presence of the first criterion, the experience of a traumatic event. Both Dr. Stewart and Dr. Foy failed to draw any connections between the traumatic events Petitioner experienced in his childhood and the remaining PTSD criteria. While Dr. Stewart testified that Petitioner's condition satisfied the remaining criteria, he acknowledged that he never discussed with Petitioner the effect of those criteria on Petitioner's conduct at the time of the murders. (*Id.* at 236.) Dr. Stewart also acknowledged that Petitioner's conduct during the murders could be attributed to his use of methamphetamine and alcohol, and that he could not determine with certainty the extent to which PTSD, as opposed to drugs and alcohol, caused Petitioner's behavior. (*Id.* at 243-44.)

Attention Deficit/Hyperactivity Disorder: The Court finds that at the time of the crimes Petitioner suffered from ADHD, residual type. The Court finds, however, based upon Dr. Scialli's testimony (RT 3/23/06 at 512), that the condition is unrelated to violent behavior and, therefore, the fact that Petitioner suffered from the condition does not serve as persuasive mitigation evidence.

Mood disorder: The Court finds that the evidence does not support a determination that Petitioner suffers from a major affective disorder, such as bipolar disorder. Specifically, the record does not show that Petitioner has experienced episodes of mania or hypomania. The record and the findings of the experts support a determination that Petitioner may suffer from a chronic, low-level mood disorder such as dysthymia. Again, the Court does not consider this to be persuasive evidence in mitigation. None of the experts suggested a causal relationship between the condition and Petitioner's conduct during the crimes.

Substance abuse: The Court finds, based upon the undisputed testimony, that at the time of the crimes Petitioner suffered from dependence on alcohol, amphetamine, and cannabis.

GOVERNING LAW

Because the PCR court denied relief on Claims 20(O), (P), and (T) based on the substantive issues, the claims were "adjudicated on the merits" and are

subject to the standard of review established by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA).

1. Standard for habeas relief

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim adjudicated on the merits by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

With respect to § 2254(d)(1), the Supreme Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *see Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154

L.Ed.2d 263 (2002) (per curiam). Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407, 120 S.Ct. 1495.

Application of these standards presents difficulties when the state court decided the merits of a claim without providing its rationale. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir.2003); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir.2002); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir.2000). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167. Although the record is reviewed independently, a federal court nevertheless defers to the state court's ultimate decision. *Pirtle*, 313 F.3d at 1167 (citing *Delgado*, 223 F.3d at 981-82); *see also Himes*, 336 F.3d at 853.

2. Clearly established federal law

The parties agree that *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the relevant clearly established Supreme Court authority. *Strickland* requires a petitioner alleging

ineffectiveness of counsel to show that counsel's performance was deficient and that the deficiency prejudiced his defense. *Id.* at 687, 104 S.Ct. 2052.

To establish deficient performance under *Strickland,* a petitioner must show that counsel's representation fell below an objective standard of reasonableness "under prevailing professional norms." *Id.* at 687-88, 104 S.Ct. 2052. As Petitioner correctly notes, failure to adequately investigate and present mitigating evidence at sentencing may constitute deficient performance. *See Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

To establish prejudice under *Strickland,* a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. Under the prejudice prong, "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691, 104 S.Ct. 2052.

The Supreme Court has emphasized that assessing prejudice in the context of capital sentencing requires the reviewing court to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins,* 539 U.S. at 534, 123 S.Ct. 2527. Thus, in assessing Petitioner's allegations of prejudice, this Court must "evaluate the totality of the available mitigation evidence-both

that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98, 120 S.Ct. 1495. To establish prejudice, a petitioner must show there "is a reasonable probability that, absent the errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of *1042 aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. In making such a determination, the Court is further guided by the principle that a sentencing decision that is supported by "overwhelming record support" is less likely to be affected by deficient performance than a decision that is weakly supported by the record. *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052.

The Ninth Circuit has elaborated on the standards governing a habeas court's review of a claim of IAC at sentencing, emphasizing that the sentencing court's decision "will stand if supportable" and that "[r]eviewing courts ... conduct their review to see if the decision can be supported, rather than to see if they would have reached the same decision." *Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir.1998). The Court of Appeals further explained that:

> In assessing prejudice in a case like this one, we are presented with a particularly difficult practical and jurisprudential question because we are not asked to imagine what the effect of certain testimony would have been upon us personally. We are asked to imagine what the effect might have

> been upon a sentencing judge, who was following the law, especially one who had heard the testimony at trial. Mitigating evidence might well have one effect on the sentencing judge, without having the same effect on a different judicial officer.

Id.

ANALYSIS

Claims 20(*O*), (P), and (T) allege that Novak rendered ineffective assistance of counsel ("IAC") at sentencing. In Claim 20(*O*), Petitioner asserts that he was denied effective assistance of counsel when Novak failed to secure the appointment of "partisan" mental health experts, in the form of a neuropsychologist and neurologist who could have revealed Petitioner's "neurological disorders and organic mental illness." (Dkt. 54 at 126.) Claim 20(P) alleges that Novak's failure to make a timely motion seeking neurological and neuropsychological testing constituted IAC. (Dkt. 54 at 126.) In Claim 20(T), Petitioner alleges that his right to effective assistance of counsel was denied due to Novak's failure to present additional mitigation evidence focusing on Petitioner's abusive childhood and the effects of his head trauma and drug abuse. (Dkt. 54 at 129.) Petitioner alleges that this information could have been established through testimony of his ex-wife, friends, family members, and former drug counselors. (*Id.*)

Petitioner alleges that the state court's denial of his

IAC claims constituted an unreasonable application of *Strickland*. (Dkt. 66 at 70, 71, 76.) The PCR court did not specifically cite the authority upon which it relied in denying relief on the claims, but the parties predicated their arguments on *Strickland*. It is reasonable to assume, therefore, that the PCR court made its decision pursuant to *Strickland*. However, the rationale it applied in doing so cannot be discerned. Therefore, this Court independently reviews the record before the PCR court, in conjunction with its *de novo* review of new evidence presented at the evidentiary hearing, to assess whether the state court, in denying Petitioner's IAC claims, "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 698-99, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

For the reasons set forth below, the Court has determined that it is unnecessary to assess the quality of counsel's performance under the first prong of *Strickland* because Petitioner has failed to meet his burden under the second prong, which requires that he "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. As the *Strickland* Court explained, "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697, 104 S.Ct. 2052 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed"); *see Smith v. Robbins*, 528 U.S. 259, 286 n. 14, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *Fields v.*

Brown, 431 F.3d 1186, 1203-04 (9th Cir.2005).

The Court has assessed prejudice with respect to Petitioner's sentencing-stage IAC claims by reevaluating Petitioner's sentence in the light of the evidence introduced in these habeas proceedings. The Court concludes that the new information is largely inconclusive or cumulative: it "barely ... alter[s] the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052. Petitioner has failed, therefore, to affirmatively demonstrate a reasonable probability that this additional information would alter the trial court's sentencing decision after it weighed the totality of the mitigation evidence against the strong aggravating circumstances proven at trial. Therefore, Petitioner is not entitled to habeas relief on the following claims.

1. Claim 20(*O*)

The PCR court's order denying this claim was not objectively unreasonable under *Strickland*. After independently reviewing the record, the Court concludes that counsel's failure to seek the appointment of a mental health expert in a more timely manner did not prejudice Petitioner. This is because Dr. Potts served as a de facto defense expert at sentencing and also because, as discussed below with respect to Claim 20(P), the results of subsequent examinations performed by the parties' mental health experts have not established a more-persuasive case in mitigation than that presented through the report and testimony of Dr. Potts.

Therefore, even if Novak had persuaded the trial court to appoint a partisan mental health expert, there is not a reasonable probability that the court, presented with the report of a defense expert in addition to Dr. Potts, would have imposed a life sentence rather than the death penalty.

At the evidentiary hearing Novak testified that, after speaking with Dr. Potts and reviewing his report, he came to regard Dr. Potts as a mitigation expert and a member of the defense team. (RT 121-22, 134-35, 151.) Novak worked closely with Dr. Potts. He provided Dr. Potts with medical and military records and the trial testimony of Dr. Sparks. (*Id.* at 47-48, 141-44.) He also provided Dr. Potts with information relating to Petitioner's family history, and Dr. Potts spoke with Petitioner's mother and step-father about Petitioner's history of drug use, his early childhood, and his head injuries. (RT 3/21/06, at 46-47.) In turn, Dr. Potts actively assisted Novak in developing a case in mitigation. As noted above, it was Dr. Potts who recommended that Novak seek a continuance to obtain additional neurological testing. (RT 3/21/06, at 121-23, 125.)

In his report and during his testimony at sentencing, Dr. Potts offered accounts of Petitioner's chaotic and abusive childhood, including details of the abuse Petitioner suffered at the hands of his first step-father. (Ex. 23 at 2; RT 12/9/93 at 80-83.) Dr. Potts reported that Petitioner's mother told him that Petitioner's personality changed when he was around fourteen years old, and that he started to get into trouble in his early teens, around the same time he

started drinking alcohol and experimenting with drugs. (Ex. 23 at 4; RT 3/21/06 at 53.) Dr. Potts referred in his report to three head injuries Petitioner suffered as a child (Ex. 23 at 3), and in his testimony at the sentencing hearing he described two additional incidents (RT 12/8/93 at 77-78, 90-91).

Dr. Potts's findings and testimony were clearly favorable to Petitioner. He concluded in his report that Petitioner's ability to conform his conduct to the requirements of the law was impaired at the time of the murders, and that Petitioner's use of drugs and alcohol significantly contributed to his conduct. (Ex. 23 at 5.) He also identified seven mitigating factors, on the basis of which he recommended against an aggravated sentence. (*Id.* at 5-6; RT 12/8/93 at 73.)

The record developed since Dr. Potts's report has added detail but also ambiguity to the diagnoses Dr. Potts offered in mitigation. Dr. Potts's report, unchallenged by other expert testimony at sentencing, found that Petitioner suffered from substance abuse and that there was a "likelihood that he suffers from a major mental illness-cyclothymia." (Ex. 23 at 5.) The report also noted many of the issues which arose during these habeas proceedings, including the genetic factor underlying Petitioner's substance abuse and mood disorder and the likelihood that Petitioner's drug and alcohol use represented an attempt at self-medication. (*Id.* at 4.) Similarly, Dr. Potts's report placed substantial emphasis on Petitioner's head injuries; although Dr. Potts spoke of the head trauma merely as "increas[ing] the potential for neurologic sequelae

contributing to [Petitioner's] behavior" (*Id.* at 6), the Court has not been presented with evidence confirming that Petitioner suffers from neurological damage caused by head trauma or other factors. Therefore, Dr. Potts's finding at sentencing remains the most persuasive statement in the record that neurological damage constituted a mitigating factor. In addition, the diagnoses not specified in Dr. Potts's report, PTSD and ADHD, are the conditions about which the parties' experts were unable to agree; and, with respect to ADHD, even a finding that Petitioner suffers from a residual form of the condition is a fact of little or no mitigating value, because, as Dr. Scialli testified, it bears no causal relationship to violent conduct.

For the reasons set forth above, Petitioner is not entitled to relief on Claim 20(O).

2. Claim 20(P)

The PCR court's decision denying this claim-alleging a failure to timely seek neurological or neuropsychological testing-was not objectively unreasonable under *Strickland*.

Neurological testing

As Respondents note, Petitioner cannot show that he was prejudiced by counsel's failure to make a timely request for neurological, as opposed to neuropsychological, testing. Petitioner has presented no evidence that neurological tests such as a CAT scan, MRI, or EEG have been performed, let alone

that their results would support a finding of cognitive impairment. FN12 Petitioner cannot, therefore, demonstrate that he was prejudiced by trial counsel's failure to secure such testing.

> FN12. Petitioner's body apparently contains metallic "pellets" which prevent him from being subjected to an MRI test. (RT 3/23/06 at 380.) However, other brain-imaging processes are available. (*Id.* at 383.)

Neuropsychological testing

As discussed above, the results of neuropsychological tests presented by the parties are largely ambiguous and inconclusive. They do not demonstrate that Petitioner suffered from cognitive impairment or PTSD at the time of the murders. Because the results of neuropsychological tests actually performed do not support these diagnoses, Petitioner cannot demonstrate that he was prejudiced by counsel's failure to seek neuropsychological testing.

In addition, while this Court has found that Petitioner suffers from a residual type of ADHD and a low-level mood disorder, these conditions do not constitute persuasive evidence in mitigation because they do not bear a relationship to Petitioner's violent behavior. As the Supreme Court has directed, the sentencer in a capital proceeding must consider all relevant mitigation evidence. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Therefore, if Petitioner had

presented the trial court with evidence that he suffered from ADHD and a low-level mood disorder, the court would have been obligated to consider such information, whether or not Petitioner could establish a connection between the conditions and his crimes. *Tennard v. Dretke*, 542 U.S. 274, 287, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004); *State v. Newell*, 212 Ariz. 389, 132 P.3d 833, 849 (2006) ("We do not require a nexus between the mitigating factors and the crime to be established before we consider the mitigation evidence."). However, the court would have been "free to assess how much weight to assign to such evidence." *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir.1998); *see Eddings*, 455 U.S. at 114-15, 102 S.Ct. 869 ("The sentencer ... may determine the weight to be given relevant mitigating evidence"). In "assessing the quality and strength" of Petitioner's mitigation evidence, therefore, the trial court could have taken into account Petitioner's "failure to establish a causal connection" between the murders and his ADHD and low-level mood disorder. *Newell*, 212 Ariz. at 389, 132 P.3d at 849. This Court concludes that the trial court would have assigned minimal significance to testimony indicating that Petitioner suffered from ADHD and a low-level mood disorder, and that this weight would not have outbalanced the factors found in aggravation.

Novak's failure to seek testing that could have revealed conditions causally unrelated to the crimes did not prejudice Petitioner. Therefore, Petitioner is not entitled to relief on Claim 20(P).

3. Claim 20(T)

The PCR court's decision denying this claim was not objectively unreasonable under *Strickland.* This claim consists of Petitioner's allegation that he was prejudiced by Novak's failure to present additional lay witnesses to support his case in mitigation. According to Petitioner, such witnesses could have "substantiate[d] claimed mitigation based on Petitioner's traumatic birth, abusive early childhood, history of drug abuse, head injuries and the effects thereof on his behavior." (Dkt. 54 at 129.) The information "could have been established through Petitioner's ex-wife, friends, family members, and former drug counselors."[FN13] (*Id.*) Petitioner also alleges that he was prejudiced by Novak's failure to obtain additional birth, school, military, and prison records. (*Id.;* Dkt. 218 at 23.)

> FN13. At the evidentiary hearing, counsel for Petitioner indicated that Petitioner was not asserting a claim that trial counsel was ineffective for failing to call for testimony from Petitioner's mother at sentencing. (RT 3/23/06 at 531.)

At the sentencing hearing, Novak presented the testimony of Randy Jones, who related the circumstances of Petitioner's traumatic birth; his abusive early childhood; his history of drug abuse and drug treatment, including his introduction to drugs by his grandfather; his history of head injuries; and the apparent effect of the drugs and head injuries on his behavior. (RT 12/8/93 at 39-68.) Novak admitted records from the Washoe Medical

Center where Petitioner was treated for drug withdrawal in 1986 and evaluated after a suicide attempt in 1987 (RT 3/21/06 at 144; Ex. 64); he also admitted recor s from the military hospital relating to the 1983 " gging" (RT 12/9/93 at 6-7; Ex. 65). Novak obtained additional records which he provided to Dr. Potts but did not present at sentencing because the information in them "could cut both ways as far as mitigation goes." (RT 3/21/06 at 145.) These records include a letter from a drug treatment program stating that Petitioner was discharged for "noncompliance with a very hostile, angry, and threatening attitude toward staff." (Ex. 25; RT 3/21/06 at 147.) Novak chose not to admit additional military records which described the details of Petitioner's bad conduct discharge from the Marines. (RT 3/21/03 at 145.) Novak did not obtain school records, but elicited testimony from Randy Jones indicating that Petitioner's grades declined when he reached adolescence. (*Id.* at 145; RT 12/8/93 at 51-52.)

At the evidentiary hearing before the PCR court, both Randy Jones and Petitioner's mother testified in support of Petitioner's IAC claims. (RT 4/4/00 at 7-38.) Mrs. Jones provided additional details of the abuse she and Petitioner suffered at the hands of Petitioner's father and first step-father. (*Id.* at 29-32, 36.) She testified that Petitioner's grades began to decline at age fifteen or sixteen. (*Id.* at 33.) She also testified that Petitioner's grandfather got him hooked on drugs. (*Id.* at 32.) PCR counsel also presented Petitioner's eighth-grade school records. (ROA-PCR 45, Ex. L.)

[7] Among the new mitigation information Petitioner has offered during the habeas proceedings are allegations that he was abused, emotionally and physically, by Randy Jones and that he was sexually molested by his grandfather. The information detailing the sexual abuse appears for the first time in Dr. Foy's 2002 report (Ex. 5), which Dr. Stewart relied on in his declaration and testimony (Ex. 1; RT 3/22/06 at 234-35).FN14 Information concerning physical abuse by Randy Jones also appears in Dr. Foy's report and in an affidavit from Petitioner's sister. (Ex. 13.)

> FN14. Although the Court's analysis relies on the prejudice prong of *Strickland,* with respect to information concerning sexual abuse by Petitioner's grandfather and physical abuse by Randy Jones, the Court additionally finds that Novak did not perform deficiently by failing to uncover information not shared by Petitioner until nearly ten years after his trial. Novak was never put on notice that sexual abuse was an issue. *See Babbitt v. Calderon,* 151 F.3d 1170, 1174 (9th Cir.1998) (counsel's failure to uncover defendant's alleged family history of mental illness was not unreasonable because none of the family members interviewed reported the occurrence of such illness).

Although Petitioner alleges that trial counsel performed deficiently by failing to offer testimony of witnesses to corroborate this abuse, at the evidentiary hearing before this Court, Petitioner did

not present the testimony of any of the witnesses cited in his petition; nor, with the exception of the affidavit from his sister, did Petitioner indicate what mitigation information could have been offered by his ex-wife, friends, family members, and former drug counselors. Petitioner did not testify at the hearing, although his self-report of the sexual abuse is presumably the basis for the information contained in the reports of Drs. Foy and Stewart. (RT 3/22/06 at 234-35.)

The Court cannot conclude that Petitioner was prejudiced by the failure of Novak to call witnesses the contents and credibility of whose testimony is unknown. The Court further observes that the sentencing judge would likely have viewed with skepticism Petitioner's more-recent allegations of sexual and physical abuse, given their late disclosure, their inconsistency with other information in the record, and Petitioner's "obvious motive to fabricate." *State v. Medrano*, 185 Ariz. 192, 194, 914 P.2d 225, 227 (1996) (defendant's "self-serving testimony is subject to skepticism and may be deemed insufficient to establish mitigation"); *see State v. Sharp*, 193 Ariz. 414, 425, 973 P.2d 1171, 1182 (1999) (self-reported, uncorroborated evidence "may be given little or no mitigation weight"). Also reducing the import the sentencing judge might have assigned to such information is the lack of a causal connection between the crimes and the new allegations of abuse. *See Sharp*, 193 Ariz. at 425, 973 P.2d at 1182 (explaining, in case involving a defendant who claimed that he had been regularly sodomized by his stepbrother over a period of eight

years, that Arizona courts "require a causal connection to justify considering evidence of a defendant's background as a mitigating circumstance") (citing *Jones*, 185 Ariz. at 490-91, 917 P.2d at 219-20). As noted above, in diagnosing Petitioner with PTSD, Petitioner's experts attempted to link his childhood physical and sexual abuse with his conduct while committing the murders. However, the experts failed to extend their diagnoses beyond a finding that Petitioner experienced traumatic events in his childhood, and therefore did not establish a nexus between the abuse and the murders.

With respect to records not previously obtained and presented at the state-court level, the Court agrees with Respondents that the records accumulated during these habeas proceedings-Petitioner's school records from first grade, medical and military records-are largely cumulative and of little mitigating value. Petitioner speculates that additional school records, drug-treatment and mental-health records, and accident reports might have been available at the time of Petitioner's trial, but such speculation, as to both the existence and the favorable contents of such records, is not sufficient to affirmatively establish prejudice. Moreover, to the extent that the information contained in unavailable records might address Petitioner's claims of cognitive impairment or other mental conditions, the results of the neuropsychological tests performed during the habeas proceedings constitute a more accurate and meaningful measure of Petitioner's functioning and thereby render such records superfluous.

For the reasons set forth above, Petitioner is not entitled to relief on Claim 20(T).

Accordingly,

IT IS ORDERED dismissing Claims 20(*O*), 20(P), and 20(T) with prejudice.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MOHAVE

HONORABLE JAMES E. CHAVEZ
DIVISION IV
DATE: MAY 23, 2000

VIRLYNN TINNELL, CLERK
***ag**

MINUTE ORDER

STATE OF ARIZONA,
Plaintiff,

vs. **NO. CR-14141**

DANNY LEE JONES,
Defendant.

After the informal conference on February 23, 2000, the Court set evidentiary hearing on petitioners post-conviction claims as follows:

1. Claim 24F (paragraphs one and two),

2. Claim 24G

3. Claim 24I (paragraphs three, six and seven)

At the start of the evidentiary hearing held on April 4, 2000, petitioner advised the Court that no evidence would be presented with regard to claim 24F paragraph two and that counsel would rely on the petition and supporting documents.

IT IS ORDERED denying claim 24F paragraph two.

With regard to claim 24F paragraph one, petitioner claims "trial counsel was unprepared for cross examination, failed to object to critical inadmissable [sic] testimony and permitted prejudicial and inadmissible evidence to be heard and viewed by the jury."

Petitioners primary complaint with this claim is that defense counsel did not interview all of the witnesses. At the evidentiary hearing, Mr. Novak explained that he had not interviewed the witnesses because he knew what they would say and he had the assistance of an expert witness who helped him with cross-examination.

With regard to Claim 24G petitioner says "Trial counsel was ineffective in failing to request funding for and present necessary witnesses and testing for trial." Petitioner alleges counsel should have obtained funds for various experts.

At the hearing Mr. Novak testified that he sought funding for an expert regarding defendants substance addiction and for a crime scene reconstructionist. The addiction expert was paid over $5,000 by the Court. The expert on reconstruction conducted pretrial work for $1,000. At the reconstruction experts' suggestion, Mr. Novak did not call

him at trial. Contrary to petitioners claim, no other experts would have been of assistance to the defense.

With regard to Claim 24I, petitioner alleges that trial counsel was ineffective at sentencing by failing ". . . to recognize the need for neurological and psychological testing . . ."

The report and testimony of Dr. Potts who was appointed by the Court, adequately addressed defendant's mental health issues at sentencing.

In addition, in paragraph 6, petitioner claims that defense counsel did not object to Mr. Butler's rebuttal testimony. Contrary to the petitioner's claim, it is clear from the record that the subject matter of Butler's testimony was disclosed to the defense. Mr. Butler's testimony addressed an issue raised by the defense. Any objection to the testimony would have been overruled.

In Claim 24I(7), petitioner alleges that "Trial counsel failed to present meaningful additional witnesses and available evidence to support Jones' proposed mitigation."

Testimony at the hearing showed that counsel presented the available witnesses and evidence to support mitigation. The additional witnesses and evidence suggested by petitioner would have been redundant.

The Court finds that the petitioner has not met its burden of proof of showing deficient performance by trial counsel.

IT IS THEREFORE, ORDERED denying the Petitioner for Post Conviction Relief.

cc:

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798219

Supreme Court of Arizona, In Banc.
STATE of Arizona, Appellee,
v.
Danny Lee JONES, Appellant.
No. CR-93-0541-AP.

May 7, 1996.

Defendant was convicted in the Mohave County Superior Court, No. CR-14141, James E. Chavez, J., of premeditated first-degree murder and attempted premeditated first-degree murder, and was sentenced to death. Convictions and sentences were automatically appealed. The Supreme Court, Robert J. Corcoran, J. (Retired), held that: (1) search and seizure was proper; (2) defense counsel did not have conflict of interest; (3) denials of motions for mistrial were proper; (4) autopsy photographs were properly admitted; (5) even if admission of prior misdemeanor theft convictions for impeachment was error, it was harmless error; (6) murders were committed for pecuniary gain; (7) victims were murdered in especially heinous, cruel, or depraved manner; and (8) refusal to continue sentencing hearing for additional mental testing was proper.

Affirmed.

Grant Woods, Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section, Susanna C. Pineda, Assistant Attorney General, Phoenix, for State of Arizona.

Ron Wood's Law Office by Ronald D. Wood, Show

Low, for Appellant.

OPINION

CORCORAN, Justice (Retired).

Danny Lee Jones (defendant) was convicted in Mohave County Superior Court of two counts of premeditated first degree murder and one count of attempted premeditated first degree murder. The trial court sentenced defendant to two consecutive death sentences for the murders and to a consecutive sentence of life imprisonment for the attempted murder. Defendant's convictions and sentences were automatically appealed to this court. A.R.S. § 13-4033; rules 26.15, 31.2(b), and 31.15(a)(3), Arizona Rules of Criminal Procedure. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), and A.R.S. §§ 13-4031, -4033, and -4035.

Factual and Procedural Background

I. Factual Background

In February 1992, defendant moved to Bullhead City, Arizona, and resumed a friendship with Robert Weaver. At this time, Robert, his wife Jackie, and their 7-year-old daughter, Tisha, were living in Bullhead City with Robert's grandmother, Katherine Gumina. As of March 1992, defendant was unemployed and was planning to leave Bullhead City.

On the night of March 26, 1992, defendant and

Robert were talking in the garage of Ms. Gumina's residence. Robert frequently entertained his friends in the garage, and during these times, he often discussed his gun collection. The two men were sitting on inverted buckets on the left side of the garage, and Ms. Gumina's car was parked on the right side of the garage. Both defendant and Robert had been drinking throughout the day and had used crystal methamphetamine either that day or the day before.

At approximately 8:00 p.m., Russell Dechert, a friend of Robert's, drove to the Gumina residence and took defendant and Robert to a local bar and to watch a nearby fire. Dechert then drove defendant and Robert back to the Gumina residence at approximately 8:20 p.m. and left, telling defendant and Robert that he would return to the Gumina residence around 9:00 p.m.

Although there is no clear evidence of the sequence of the homicides, the scenario posited to the jury was as follows. After Dechert left, defendant closed the garage door and struck Robert in the head at least three times with a baseball bat. Robert fell to the ground where he remained unconscious and bleeding for approximately 10 to 15 minutes. Defendant then entered the living room of the Gumina residence where Ms. Gumina was watching television and Tisha Weaver was coloring in a workbook. Defendant struck Ms. Gumina in the head at least once with the baseball bat, and she fell to the floor in the living room.

Tisha apparently witnessed the attack on Ms. Gumina, ran from the living room into the master bedroom, and hid under the bed. Defendant found Tisha and dragged her out from under the bed. During the struggle, Tisha pulled a black braided bracelet off defendant's wrist. Defendant then struck Tisha in the head at least once with the baseball bat, placed a pillow over her head, and suffocated her, or strangled her, or both.

Defendant next emptied a nearby gun cabinet containing Robert's gun collection, located the keys to Ms. Gumina's car, and loaded the guns and the bat into the car. At some point during this time, Robert regained consciousness, and, in an attempt to flee, moved between the garage door and Ms. Gumina's car, leaving a bloody hand print smeared across the length of the garage door and blood on the side of the car. Robert then climbed on top of a work bench on the east side of the garage, leaving blood along the east wall. Defendant struck Robert at least two additional times in the head with the baseball bat, and, as Robert fell to the ground, defendant struck him in the head at least once more.

A few minutes before 9:00 p.m., Dechert returned to the Gumina residence and noticed that the garage door, which previously had been open, was closed. Dechert went to the front door and knocked. Through an etched glass window in the front door, he saw the silhouette of a person locking the front door and walking into the master bedroom. Dechert then looked through a clear glass portion of the window and saw defendant walk out of the master bedroom.

He heard defendant say, "I will get it," as if he were talking to another person in the house. Defendant then opened the front door, closing it immediately behind him, walked out onto the porch, and stated that Robert and Jackie had left and would return in about 30 minutes. Dechert noticed that defendant was nervous, breathing hard, and perspiring. Although Dechert felt that something was wrong, he left the Gumina residence. As he was leaving, Dechert heard the door shut as if defendant went back into the house. Shortly thereafter, defendant left the Gumina residence in Ms. Gumina's car.

At approximately 9:10 p.m., Jackie Weaver returned home from work. When she opened the garage door, she found Robert lying unconscious on the garage floor. Jackie ran inside the house and found Ms. Gumina lying on the living room floor and her daughter Tisha lying under the bed in the master bedroom. She then called the police, who on arrival determined that Tisha and Robert were dead and that Katherine Gumina was alive but unconscious. The medical examiner later concluded that Robert's death was caused by multiple contusions and lacerations of the central nervous system caused by multiple traumatic skull injuries. The cause of Tisha's death was the same as Robert's, but also included possible asphyxiation.

After leaving the Gumina residence, defendant picked up his clothes from a friend's apartment where he had been staying and drove to a Bullhead City hotel. At some point before reaching the hotel, he threw the bat out the car window. Defendant

parked the car at the hotel and hailed a taxi cab to drive him to Las Vegas, Nevada. The police eventually recovered Ms. Gumina's car and found a pink baseball cap and a note, which were identified at trial as belonging to defendant.

When defendant arrived in Las Vegas, he gave the cab driver one of Robert's guns to pay for the fare and checked into a hotel. The next day, however, defendant met Marcia and Gary Vint and arranged to pay rent to sleep on the couch in their apartment. While at the apartment, he sold most of the remaining guns from Robert's collection. The police ultimately recovered several of the guns; two witnesses from Las Vegas testified that defendant sold them the guns, and Jackie Weaver identified the guns as Robert's.

A few days later, the Vints learned that defendant was a suspect in the Bullhead City murders. By then, defendant was staying at another apartment the Vints had rented, although his belongings were still at the original apartment. The Vints called the Las Vegas police, who arrested defendant and took possession of his belongings.

II. Procedural Background

The state charged defendant with two counts of premeditated first degree murder and one count of attempted premeditated first degree murder. Although Katherine Gumina ultimately died as a result of the injuries defendant inflicted, the state chose not to amend the indictment. Defendant

pleaded not guilty to all of the charges. At trial, defendant testified that he killed Robert Weaver in self-defense, that he struck Katherine Gumina reflexively and without criminal intent because she startled him, and that another person killed Tisha Weaver. The jury found defendant guilty of all three counts.

The trial court then held an aggravation/mitigation hearing. With respect to Robert's murder, the trial court found three aggravating circumstances: (1) defendant committed the murder for pecuniary gain, A.R.S. § 13-703(F)(5); (2) defendant committed the murder in an especially heinous, cruel, or depraved manner, A.R.S. § 13-703(F)(6); and (3) defendant was convicted of one or more other homicides that were committed during the commission of the offense, A.R.S. § 13-703(F)(8). With respect to Tisha's murder, the trial court found the above three aggravating circumstances and the additional aggravating circumstance that the victim was under 15 years of age, A.R.S. § 13-703(F)(9).

With respect to both murders, the trial court found no statutory mitigating circumstances. The court did find that defendant proved the following nonstatutory mitigating circumstances by a preponderance of the evidence: (1) defendant suffers from long-term substance abuse; (2) at the time of the offense, defendant was under the influence of alcohol and drugs; (3) defendant had a chaotic and abusive childhood; and (4) defendant's substance abuse problem may have been caused by genetic factors and aggravated by head trauma. The trial

court concluded, however, that these circumstances were not sufficiently substantial to outweigh the aggravating circumstances or to call for leniency and sentenced defendant to two consecutive death sentences. The court also sentenced defendant to a consecutive sentence of life imprisonment, without the possibility of release or parole for 25 years, for the attempted first degree murder of Ms. Gumina. The convictions and sentences were automatically appealed to this court.

Issues Presented

We address the following issues raised in defendant's brief. The pretrial issues are:

1. Whether the trial court erroneously denied defendant's motion to suppress evidence that the police obtained while searching defendant's bags; and

2. Whether the trial court erroneously denied defense counsel's motion to withdraw based on a potential conflict of interest.

The trial issues are:

1. Whether the trial court erroneously denied defendant's motion for mistrial based on an alleged violation of rule 9.3(a), Arizona Rules of Criminal Procedure;

2. Whether the trial court erroneously denied defendant's motion for mistrial based on alleged improper influence on the jury;

3. Whether the trial court erroneously admitted autopsy photographs of Tisha Weaver and Katherine Gumina; and

4. Whether the trial court erroneously denied defendant's motion for mistrial based on the admission of two prior misdemeanor theft convictions as impeachment evidence.

The sentencing issues are:

1. Whether the trial court erroneously found that defendant murdered Tisha and Robert Weaver for pecuniary gain;

2. Whether the trial court erroneously found that defendant murdered Tisha and Robert Weaver in an especially heinous, cruel, or depraved manner; and

3. Whether the trial court erroneously denied defendant's motion to continue the sentencing hearing to allow further testing to determine if defendant suffers from organic brain disorder.

Discussion

I. Pretrial Issues

A. Search and Seizure of Defendant's Belongings

Defendant raises three arguments related to the evidence the police obtained from the search and seizure of his belongings. Specifically, he challenges

the seizure of his belongings by the Las Vegas police, the subsequent search by the Bullhead City police detectives, and the inventory search by the Las Vegas police. We address these arguments in turn and set forth the relevant facts as follows.

In Las Vegas, Nevada, defendant met Marcia and Gary Vint and arranged to pay them $50 per week to sleep on the couch at their apartment (the Arville Street apartment). During the first couple of days, defendant gave the Vints $50, apparently to pay for groceries. Defendant kept his belongings, which were contained in a duffel bag, a backpack, and a white trash bag, in one side of the apartment's dining room closet. The Vints also kept things in this closet.

On March 30, the Vints leased a new apartment (the Ida Street apartment), to which they planned to move on March 31. On March 30, defendant spent the night at the Ida Street apartment, although his belongings remained at the Arville Street apartment. On the morning of March 31, the Vints read in the newspaper that a person named Danny Lee Jones was suspected of murdering Tisha and Robert Weaver. The Vints looked through defendant's belongings to verify his name and then notified the Las Vegas police that defendant was staying with them.

The police arrested defendant that day at the Ida Street apartment. The police then returned to the Arville Street apartment because the Vints told them that defendant had left some belongings there which they did not want to keep. The police took possession

of defendant's belongings from the dining room closet and a .22 rifle, identified as similar to one that Robert owned, found under the living room sofa. They also conducted a cursory search of defendant's bags to check for weapons and placed the items in the trunk of the patrol car. The police did not have a search warrant.

While the Las Vegas police were still at the Arville Street apartment, two Bullhead City police detectives arrived and searched defendant's belongings, which were being stored in the trunk of a patrol car. The Bullhead City detectives, who also did not have a search warrant, identified the blood-stained clothing that defendant wore on the night of the murders. The Las Vegas police then impounded all of defendant's belongings and conducted an inventory search at the police station.

Before trial, defendant moved to suppress the clothing that the police obtained from the Arville Street apartment, but not the .22 rifle. The trial court held that the Vints had authority to consent to the search and seizure of defendant's property because defendant did not have exclusive authority over any area of the Arville Street apartment, the Vints believed they had no further duty to store defendant's belongings, and defendant had no agreement for indefinite storage of his property at the apartment. The court also held that any subsequent searches or seizures were valid. We review a trial court's denial of a motion to suppress under a clear abuse of discretion standard. *State v. Atwood*, 171 Ariz. 576, 603, 832 P.2d 593, 620 (1992),

cert. denied, 506 U.S. 1084, 113 S.Ct. 1058, 122 L.Ed.2d 364 (1993).

1. Initial Search and Seizure of Defendant's Belongings by the Las Vegas Police

Defendant argues that the Las Vegas police illegally seized his belongings from the Arville Street apartment because they did not have a search warrant and the Vints lacked authority to turn the property over to the police. Defendant first asserts that he and the Vints had established a landlord-tenant relationship and that, under Nevada law, a landlord is required to store a tenant's property safely for 30 days after the abandonment or eviction of the tenant or the end of the rental period. *See* Nev.Rev.Stat. § 118A.460(1)(a) (Supp.1995). Defendant asserts that the Vints violated this statute when they allowed the Las Vegas police to seize his belongings.

Defendant, however, raises this argument for the first time on appeal. An issue not raised below is waived absent fundamental error, and we find none here. *State v. Bolton,* 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995); *see also State v. Gendron,* 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991), quoting *State v. Smith,* 114 Ariz. 415, 420, 561 P.2d 739, 744 (1977) (defining fundamental error as "error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial"). Even if we assume that this statute applies and that the Vints violated it, the remedy would be civil or criminal liability on the part of the Vints and not suppression.

See Nev.Rev.Stat. § 118A.460(1)(a). Therefore, the argument, even if accepted, would not have affected the trial's outcome.

Defendant next argues that the seizure of his belongings was unconstitutional because the Vints lacked authority to consent to the seizure. Generally, the police must obtain a warrant before searching or seizing premises or property in which an individual has a reasonable expectation of privacy. U.S. Const. amends. IV & XIV; *see also Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576 (1967); *State v. Castaneda*, 150 Ariz. 382, 389, 724 P.2d 1, 8 (1986). An exception to this requirement, however, exists where a third party with "common authority over or other sufficient relationship to the premises or effects sought to be inspected" voluntarily consents to the search or seizure. *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *see also Castaneda*, 150 Ariz. at 389, 724 P.2d at 8. The state must prove consent by "clear and positive evidence."." *State v. Lucero*, 143 Ariz. 108, 110, 692 P.2d 287, 289 (1984).

In this case, the parties do not contest that defendant had a reasonable expectation of privacy regarding his belongings at the Vints' apartment or that the Vints' consent was voluntary. Thus, our inquiry focuses on the Vints' authority over and relationship to defendant's property. The Court in *Matlock* explained that common authority exists when there is

> mutual use of the property by persons generally

> having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

415 U.S. at 171 n. 7, 94 S.Ct. at 993 n. 7; *see also State v. Heberly*, 120 Ariz. 541, 543-44, 587 P.2d 260, 262-63 (App.1978) (adopting this language). Moreover, when determining whether common authority exists, the focus is on apparent authority, rather than actual authority. *Castaneda*, 150 Ariz. at 389, 724 P.2d at 8 ("[I]f it reasonably appeared that a third party had common authority over the premises, then the consent to search would be valid.").

We find that the trial court did not abuse its discretion when it denied defendant's motion to suppress on the basis that the Vints had apparent authority to consent to the search. The uncontroverted evidence at trial was that the Vints had joint access to and control over the dining room closet where defendant's belongings were found and that defendant did not have the right to exclude them from this area. Moreover, it was reasonable to recognize that defendant assumed the risk that the Vints would allow the common area to be searched when defendant chose to leave his belongings at the Arville Street apartment. Therefore, the seizure of defendant's belongings was proper.

2. Search by the Bullhead City Police Detectives

Defendant next argues that the warrantless search by the Bullhead City police detectives of his belongings while they were in the Las Vegas police patrol car was unconstitutional. Defendant reasons that the search does not fall within the inventory exception to the warrant requirement because the Las Vegas police department's standard inventory procedures do not include "interim" searches.

Although defendant correctly asserts that this search does not fall within the inventory exception, the evidence is admissible under the inevitable discovery doctrine. The inevitable discovery doctrine, which is an exception to the exclusionary rule, provides that illegally obtained evidence is admissible "[i]f the prosecution can establish by a preponderance of the evidence that the illegally seized items or information would have inevitably been seized by lawful means...." *State v. Ault*, 150 Ariz. 459, 465, 724 P.2d 545, 551 (1986), citing *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984); *see also State v. Lamb*, 116 Ariz. 134, 138, 568 P.2d 1032, 1036 (1977) ("[E]vidence obtained as a result of an unlawful search need not be suppressed where, in the normal course of the police investigation and absent the illicit conduct, the evidence would have been discovered anyway.").

In this case, the Bullhead City police detectives searched defendant's belongings while they were in the trunk of the Las Vegas police patrol car, which was parked at the Arville Street apartment. During the search, the detectives discovered the clothing defendant wore on the night of the murders. When

the detectives finished their search, the Las Vegas police transported defendant's belongings to the police station and conducted a lawful inventory search, which we discuss below. The Las Vegas police inevitably would have conducted their inventory search and found defendant's clothing, regardless of whether the Bullhead City detectives identified defendant's clothing. Therefore, the trial court did not abuse its discretion when it denied defendant's motion to suppress the evidence on this basis.

3. Inventory Search by the Las Vegas Police

Defendant's final argument regarding the search and seizure of his belongings is that the inventory search by the Las Vegas police was unconstitutional because the police did not conduct the search pursuant to standardized criteria. Because defendant did not make this argument in his motion to suppress, our inquiry is limited to fundamental error analysis. *See State v. Bolton*, 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995) (issue not raised with trial court is waived absent fundamental error).

Even if defendant had properly preserved the issue, his argument lacks merit. Inventory searches are permissible if "conducted pursuant to standardized criteria and not because of mere suspicions of criminal activity." *State v. West*, 176 Ariz. 432, 441, 862 P.2d 192, 201 (1993), *cert. denied*, 511 U.S. 1063, 114 S.Ct. 1635, 128 L.Ed.2d 358 (1994) (testimony that police policy was to list contents of vehicles taken into possession sufficient to find valid inventory search). In this case, an officer testified at

the suppression hearing that the Las Vegas police conduct an inventory search whenever they obtain evidence, which includes listing each item of evidence on an impound sheet and placing the evidence into an evidence vault, and that they followed this procedure in this case. The officer's testimony is sufficient to establish that the police followed standardized criteria when they conducted the inventory search, and the search presents neither error nor fundamental error.

B. Defense Counsel's Motion to Withdraw

Approximately two weeks before trial, defense counsel learned that Cordell Reid, who was defendant's cellmate, would testify that the day before the murders he saw Robert Weaver and an unknown person arguing in the backyard of the Gumina residence, and that on the night of the murders he saw a small blue car and a white car leaving the Gumina residence. Reid's testimony would corroborate defendant's claim that he killed Robert in self-defense and that someone else murdered Tisha.

After learning of Reid, the state interviewed him and, 4 days before trial, disclosed him as a potential witness for the state. The next day, defense counsel, a public defender, moved to withdraw from representing defendant because the public defender's office previously had represented Reid, and defense counsel and another public defender had discussed the prior representation and Reid's general character. Defense counsel argued that he would

have to withdraw unless the state guaranteed that Reid would not be called as a witness. After a hearing on the issue, during which the state asserted that it did not intend to call Reid as a witness, the trial judge denied defense counsel's motion but stated that he would reconsider the issue if and when the state actually called Reid to testify.

On appeal, defendant argues that the trial court should have allowed defense counsel to withdraw because defense counsel had a conflict of interest and because the state's listing of Reid as a potential witness created the appearance of impropriety. Defendant further argues that the denial of the motion violated the United States and Arizona Constitutions because it denied defendant the opportunity to call a witness.

We will overturn a trial court's decision on a motion to withdraw only if the trial court abused its discretion. *Okeanj v. Superior Court*, 178 Ariz. 180, 181, 871 P.2d 727, 728 (App.1993). In this case, the trial court acted well within its discretion. First, no conflict of interest developed in this case because neither the state nor defense counsel called Reid as a witness at trial. The trial court properly reserved ruling on this issue until any actual conflict arose, and, because Reid did not testify, we need not address whether his testimony ultimately would have resulted in a conflict for defense counsel. Second, contrary to defendant's assertions, the trial court's order did not preclude defense counsel from calling Reid as a witness. If defendant is in fact arguing that defense counsel's decision not to call

Reid to testify was ineffective assistance of counsel, he must do so in a proceeding for post-conviction relief. *See* State v. Carver, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("We will not reverse a conviction on ineffective assistance of counsel grounds on direct appeal absent a separate evidentiary hearing concerning counsel's actions or inactions.").

II. Trial Issues

A. Alleged Violation of Rule 9.3(a), Arizona Rules of Criminal Procedure

Before trial began, defendant asked the court to exclude prospective witnesses from the courtroom. Rule 9.3(a), Arizona Rules 14, 15 of Criminal Procedure, requires the court, at the request of either party, to exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses and to direct the witnesses not to communicate with each other.[FN1] In addition, rule 9.3(d) provides that when the rule has been invoked, the parties "shall nevertheless be entitled to the presence of one investigator at counsel table." In this case, the state designated Detective Jerry Duke, who also was a witness for the state, as its investigator. The trial court did not state on the record whether Duke was entitled to speak with other witnesses for the state during the trial.

FN1. A similar rule is codified at rule 615, Arizona Rules of Evidence.

At trial, Samuel Howe, a blood spatter expert for the state, testified about blood shown in photographs of the victims and the crime scene. During a recess in the middle of Howe's direct examination, defense counsel saw Duke talking with Howe and motioning toward the photographs to which Howe's testimony had referred. Howe continued testifying after the recess, and defense counsel cross-examined him but did not ask him about his conversation with Duke.

At the conclusion of Howe's testimony, defense counsel told the court about the conversation between Howe and Duke and asked the court to strike Howe's testimony or, alternatively, to declare a mistrial. The trial judge questioned Duke about the conversation, and Duke stated that he had asked Howe about an opinion that Howe had given before the recess, because Duke had an alternative opinion, but that Howe's post-recess testimony remained consistent with his pre-recess testimony, despite the conversation. Defense counsel also asked the trial judge to question Howe about the conversation, and the judge agreed to do so. The judge stated, however, that he wanted to question the bailiff about another issue first. After questioning the bailiff, the judge did not question Howe about the conversation but instead asked whether the parties had anything further to present on either issue. Both parties stated that they did not, and the trial judge declined to strike Howe's testimony or to declare a mistrial.

On appeal, defendant argues that the trial judge should have declared a mistrial because the conversation between Duke and Howe violated rule

9.3(a). Defendant further argues that the conversation was prejudicial because Howe's testimony was the only evidence that directly refuted defendant's self-defense claim. Finally, defendant argues that the trial judge improperly refused to question Howe about the conversation and, as a result, precluded defendant from making an adequate record.

If a witness violates rule 9.3(a), the trial court has discretion when deciding whether to admit that witness's testimony. *State v. Gulbrandson*, 184 Ariz. 46, 63, 906 P.2d 579, 596 (1995). We will reverse the trial court's decision only when the defendant shows that the trial court abused its discretion and that the defendant suffered prejudice. *Gulbrandson*, 184 Ariz. at 63, 906 P.2d at 596.

Assuming without deciding that the prohibition against talking to other witnesses applies to the investigator-witness designated under rule 9.3(d), Arizona Rules of Criminal Procedure, there is no indication that Duke improperly influenced Howe. Rather, Duke testified that Howe's pre-recess and post-recess testimony was consistent, and defendant has not presented any evidence to the contrary. Moreover, defendant chose not to cross-examine Howe regarding the conversation. Therefore, we find that the trial court did not abuse its discretion and defendant has not shown prejudice.

B. Alleged Improper Jury Influence

During the trial, defendant saw the bailiff smile at

Samuel Howe, the state's blood spatter expert, when Howe took the stand to testify. Defendant disclosed the conduct to the court and asked the court to instruct the bailiff not to influence the jury. The trial court noted that it did not notice any inappropriate behavior but nonetheless questioned the bailiff about that instance and about a conversation the bailiff had with Howe during a recess. The bailiff stated that he and Howe mostly discussed Howe's father but that the trial "probably was mentioned." The court then allowed defense counsel to question the bailiff, and during that questioning, the bailiff stated that he and Howe started their conversation next to the jury box but that they moved when the jury returned to the courtroom and that he was sure that the jury could not overhear the conversation.

After questioning the bailiff, defendant moved for a mistrial, arguing that the conversation between the bailiff and Howe created the impression for the jury that Howe was a credible witness and that the jury may have overheard the conversation. The trial court denied defendant's motion for a mistrial, stated that it would instruct the bailiff not to talk with any of the witnesses in the case, and admonished the jury to disregard any interaction between the bailiff, or any other court personnel, and any witness.

Defendant argues on appeal that the trial court should have granted a new trial because the conversation between the bailiff and Howe improperly influenced the jury. Defendant also argues that the trial court abused its discretion when it denied defense counsel's request to inquire further

into the issue.

As a general rule, "[j]urors and witnesses should avoid any contact or conversation during trial." *State v. Lang*, 176 Ariz. 475, 482, 862 P.2d 235, 242 (App.1993). However, "[s]uch improper contact is not grounds for a mistrial unless the defense establishes that the misconduct was prejudicial or that prejudice can fairly be presumed." *Lang*, 176 Ariz. at 482, 862 P.2d at 242. Moreover, we will not overturn a trial court's decision to grant or deny a new trial because of alleged improper contact with the jury absent a clear abuse of discretion. *Lang*, 176 Ariz. at 482, 862 P.2d at 242.

In this case, the trial court did not observe any inappropriate behavior by either the bailiff or Howe that would influence the jury. The court conducted an evidentiary hearing and learned that the conversation may have mentioned the trial but that the jury probably could not overhear the conversation. The court also admonished the jury to disregard any interaction between the bailiff and any of the witnesses. We therefore conclude that the trial court acted within its discretion when it determined that the conversation between the bailiff and Howe was not prejudicial.

C. Admissibility of Autopsy Photographs

Defendant argues on appeal that the trial court abused its discretion when it admitted into evidence 5 autopsy photographs of Tisha Weaver and Katherine Gumina.[FN2] At trial, defendant filed a

motion in limine objecting to the admissibility of several photographs. That motion did not object to the autopsy photographs of Tisha Weaver and Katherine Gumina; rather, it conceded that the autopsy photographs of Tisha Weaver "might be helpful in explaining certain medical testimony" and stated that defendant had not yet received any autopsy photographs of Katherine Gumina. At the hearing on the motion, defendant relied on his written brief. Moreover, when the state moved to admit the photographs into evidence at trial, including the autopsy photographs of Katherine Gumina, defendant stated that he had no objection. Thus, defendant has waived this argument absent fundamental error. *State v. Bolton*, 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995).

> FN2. Although defendant lists the admissibility of the crime scene photographs as an issue in his brief, he concedes in the text of his brief that the trial court acted within its discretion when it admitted these photographs. We have reviewed all of the crime scene photographs. Some graphically depict the brutal nature of the crime; however, they were relevant, not unduly cumulative, and not so gruesome so as to incite or inflame the jury. *See State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995). We conclude that the trial court properly admitted the photographs and find no fundamental error.

We find that the admission of the photographs was not fundamental error. A photograph is admissible if

(1) the photograph is relevant to an issue in the case, and (2) the photograph does not have a tendency to incite or inflame the jury. *State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995). Exhibit 125 depicts bone fractures on the back of Ms. Gumina's skull, and exhibits 129-31 depict injuries to Tisha's skull and brain. These photographs were relevant to illustrate the medical examiner's testimony, to show the cause of Ms. Gumina's and Tisha's deaths and the similarities of their injuries, and to refute defendant's claim that another person killed Tisha. Finally, exhibit 132 depicts the flushed condition of Tisha's face, which supports the conclusion that she was strangled or suffocated.

Although these photographs are gruesome, they are clinical in nature. Only one depicts a victim's face. Indeed, without any accompanying explanation, discerning which victim is the subject of each photograph is difficult, with the exception of the photograph of Tisha's face. In contrast to the other photographs, the one of Tisha's face is taken at an angle such that the blunt force injury to her head is not visible. Therefore, we conclude that the photographs were relevant and not unfairly prejudicial, and their admission was not error.

D. Impeachment with Prior Misdemeanor Theft Convictions

The trial court held a pretrial hearing to determine whether the state could impeach defendant with 5 prior convictions pursuant to rule 609(a), Arizona Rules of Evidence. Under that rule, a prior conviction

is admissible to impeach if the crime "(1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or (2) involved dishonesty or false statement, regardless of the punishment." The convictions at issue were: (1) misdemeanor larceny in 1983, (2) felony attempted grand larceny in 1984, (3) misdemeanor theft in 1990, (4) misdemeanor theft in 1991, and (5) felony theft in 1991. After the hearing, the trial court ruled that the 1983 misdemeanor conviction was not admissible but that the 1984 and 1991 felony convictions were admissible. The court took the issue of the 1990 and 1991 misdemeanor convictions under advisement.

At a later pretrial hearing, the court again heard oral argument about the remaining two misdemeanor convictions. The state argued that the misdemeanors were admissible if they involved "moral turpitude" and that "theft falls into that category." Defendant responded that the misdemeanor convictions should be excluded as unfairly prejudicial. Ultimately, the trial court ruled that the convictions were admissible for impeachment purposes, and the state impeached defendant at trial with these misdemeanor convictions and the two felony convictions.

On appeal, defendant argues that the trial court should have excluded the 1990 and 1991 misdemeanor theft convictions under rule 609(a) because theft is not a crime involving dishonesty or false statement. Defendant further argues that the error was not harmless because defendant's

credibility was critical to his case, the convictions were relatively recent, and the convictions were related to the state's theory of the motive for the murders. In response, the state concedes that the trial court erred but argues that the error was harmless because the misdemeanor convictions were merely cumulative in light of the other properly admitted impeachment evidence.

Where a defendant raises only a general objection to evidence at trial, the argument is waived, and our review is limited to whether admission of the evidence constituted fundamental error. *State v. Walker*, 181 Ariz. 475, 481, 891 P.2d 942, 948 (App.1995); *see also* Ariz.R.Evid. 103(a)(1); Udall, *Evidence* § 12, at 18. In this case, defendant argued at trial that the convictions were inadmissible because they were unfairly prejudicial. Defendant did not assert, as he does now, that the convictions were inadmissible because they did not involve dishonesty or false statement, and therefore, he has waived this argument.

Even if we assume that the trial court erred and defendant preserved the issue, the error was harmless. Error is harmless if it can be shown beyond a reasonable doubt that the error did not affect the verdict. *State v. Lundstrom*, 161 Ariz. 141, 150, 776 P.2d 1067, 1076 (1989); *see also Chapman v. California*, 386 U.S. 18, 22-23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). Although the misdemeanor convictions were relatively recent and related to the state's theory with respect to motive, the state properly impeached defendant with the 1991 felony

theft and 1984 felony attempted grand larceny convictions. Moreover, overwhelming evidence at trial connected defendant with the murders. Thus, we can conclude beyond a reasonable doubt that the error did not affect the verdict, and admission of the convictions to impeach defendant was not fundamental error.

III. Sentencing Issues

A. Aggravating Circumstances

Regarding Robert Weaver's murder, the trial court found three aggravating circumstances: (1) defendant committed the murder for pecuniary gain, A.R.S. § 13-703(F)(5); (2) defendant committed the murder in an especially heinous, cruel, or depraved manner, A.R.S. § 13-703(F)(6); and (3) defendant was convicted of one or more other homicides that were committed during the commission of the offense, A.R.S. § 13-703(F)(8). Regarding Tisha Weaver's murder, the trial court found the above 3 aggravating circumstances and that the victim was under 15 years of age, A.R.S. § 13-703(F)(9).

The state must prove aggravating circumstances beyond a reasonable doubt. *State v. Rockwell*, 161 Ariz. 5, 14, 775 P.2d 1069, 1078 (1989). Defendant does not challenge the (F)(8) and (F)(9) aggravating circumstances on appeal, and our review of the record confirms that they were proved beyond a reasonable doubt. *See State v. Greenway*, 170 Ariz. 155, 167-68, 823 P.2d 22, 34-35 (1991) (explaining that the (F)(8) aggravating factor applies to multiple

murders); *State v. Gallegos*, 178 Ariz. 1, 15, 870 P.2d 1097, 1111, *cert. denied*, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 289 (1994) (finding (F)(9) aggravating factor where defendant was tried as an adult and the victim was younger than 15). We now discuss the (F)(5) and (F)(6) aggravating circumstances.

1. Pecuniary Gain

Defendant argues on appeal that the evidence presented at trial was not sufficient to support the trial court's finding that defendant committed the murders in the expectation of pecuniary gain. The trial court may not find pecuniary gain in every case in which "a person has been killed and at the same time defendant has made a financial gain." *State v. Correll*, 148 Ariz. 468, 479, 715 P.2d 721, 732 (1986). Rather, the expectation of pecuniary gain must be a motive, cause, or impetus for the murder and not merely a result of the murder. *State v. Spencer*, 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993), *cert. denied*, 510 U.S. 1050, 114 S.Ct. 705, 126 L.Ed.2d 671 (1994).

We find that the record supports the trial court's finding of pecuniary gain. At the time of the murders, defendant was not working and had only a small amount of money. Defendant was living with a friend, but on the day before the murders that friend told defendant that he could not live with her anymore. Defendant knew that warrants were pending for his arrest, and he wanted to leave Bullhead City. Finally, defendant knew about Robert Weaver's gun collection. Because ample evidence

shows that defendant murdered Tisha Weaver and Robert Weaver as part of a plan to obtain the gun collection and leave Bullhead City, we conclude that the trial court properly found the aggravating circumstance of pecuniary gain.

2. Especially Heinous, Cruel, or Depraved

The especially heinous, cruel, or depraved aggravating circumstance is phrased in the disjunctive; if any one of the three factors is found, the circumstance is satisfied. *State v. Murray*, 184 Ariz. 9, 37, 906 P.2d 542, 570 (1995).

a. Cruelty

Cruelty focuses on the victim's state of mind and exists when the defendant "inflicts mental anguish or physical abuse before the victim's death." *State v. Walton*, 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989). Mental anguish results when the victim experiences significant uncertainty about his or her ultimate fate. *Murray*, 184 Ariz. at 37, 906 P.2d at 570. Moreover, we have held that "when a victim is bludgeoned to death, the state must prove beyond a reasonable doubt that the victim experienced pain before losing consciousness." *State v. Kiles*, 175 Ariz. 358, 371, 857 P.2d 1212, 1225 (1993), *cert. denied*, 510 U.S. 1058, 114 S.Ct. 724, 126 L.Ed.2d 688 (1994) (cruelty found where victim regained consciousness).

We find that the record supports the trial court's finding of cruelty beyond a reasonable doubt with respect to both murders. Regarding Robert Weaver's

murder, the trial court found that "Robert ... had time to contemplate his fate as he fled from the defendant" and that "[t]he killing therefore was cruel." The physical evidence and expert testimony at trial showed that after the initial blows, Robert fell to the ground, where he remained unconscious and bleeding for at least 10 to 15 minutes. Robert then moved between the garage door and Katherine Gumina's car, leaving a bloody handprint smeared across the length of the garage door and blood on the side of the car, and climbed on top of a work bench, leaving blood along the east wall. This evidence is sufficient to establish that Robert regained consciousness and experienced pain and uncertainty about his fate and thus is sufficient to uphold the trial court's finding of cruelty. *See Kiles*, 175 Ariz. at 371, 857 P.2d at 1225.

Regarding Tisha Weaver's murder, the trial court found that Tisha had time to contemplate her fate. She knew that her great-grandmother had been attacked, and she struggled with defendant for her life. The following evidence was presented at trial: (1) although Tisha was wearing pajamas when the police discovered her body, the beds were still made and she had not yet gone to bed when the murders occurred; (2) a child's workbook and colored pencils were in the living room; (3) Tisha's body was under the master bedroom bed with her legs spread and marks on the carpet indicated that she had been pulled out from under the bed; and (4) the police found a black bracelet, similar to one that defendant had been seen wearing, next to Tisha's head. Although we cannot conclusively determine whether

Tisha witnessed defendant attacking Katherine Gumina, sufficient evidence supports our conclusion that Tisha was awake when the murders occurred, that she hid under her parents' bed because she was afraid, and that she struggled with defendant and pulled the bracelet off his wrist. Therefore, we can conclude beyond a reasonable doubt that she experienced uncertainty about her fate and that the murder was cruel.

b. Heinous or Depraved

Heinousness and depravity focus on the defendant's state of mind and attitude at the time of the murders. *Murray*, 184 Ariz. at 37, 906 P.2d at 570. We look for the following circumstances when determining whether a crime is especially heinous or depraved: (1) apparent relishing of the murder; (2) infliction of gratuitous violence; (3) mutilation of the victim's body; (4) senselessness of the crime; and (5) helplessness of the victim. *State v. Gretzler*, 135 Ariz. 42, 51-52, 659 P.2d 1, 10-11 (1983). The last two factors are less probative of a defendant's state of mind than the first three. *Murray*, 184 Ariz. at 37-38, 906 P.2d at 570-71, citing *State v. King*, 180 Ariz. 268, 287, 883 P.2d 1024, 1043 (1994), *cert. denied*, 516 U.S. 880, 116 S.Ct. 215, 133 L.Ed.2d 146 (1995) ("[O]nly under limited circumstances will the senselessness of a murder or the helplessness of the victim ... lead to [finding heinousness or depravity]."). Additionally, evidence that the murder was committed to eliminate a witness can support a finding of heinousness and depravity. *State v. Ross*, 180 Ariz. 598, 606, 886 P.2d 1354, 1362 (1994), *cert.*

denied, 516 U.S. 878, 116 S.Ct. 210, 133 L.Ed.2d 142 (1995).

Regarding Robert Weaver's murder, the trial court found that defendant inflicted gratuitous violence on Robert, that the murder was senseless, and that Robert was helpless. After the first blows, Robert was unconscious and bleeding, and he did not pose an obstacle to defendant's goal of taking the guns. *State v. West*, 176 Ariz. 432, 448, 862 P.2d 192, 208 (1993), *cert. denied*, 511 U.S. 1063, 114 S.Ct. 1635, 128 L.Ed.2d 358 (1994) (murder is senseless if unnecessary to achieve defendant's goal). Although Robert regained consciousness, it appears that he was attempting to flee and was not attempting to stop defendant from taking the guns. Even if he was attempting to stop defendant, he more than likely was no longer physically capable of doing so. Additionally, the initial blows rendered Robert helpless. Thus, the record supports the trial court's finding of senselessness and helplessness beyond a reasonable doubt.

The record also supports the trial court's finding that defendant inflicted gratuitous violence on Robert. Gratuitous violence is violence clearly beyond that necessary to cause death. *State v. Greenway*, 170 Ariz. 155, 166, 823 P.2d 22, 33 (1991). At trial, the blood spatter expert testified that, after the initial blows, Robert regained consciousness, attempted to flee, and climbed on top of a work bench. The expert further testified that, while Robert was on the work bench, defendant struck him at least two additional times in the head with the baseball bat, and, as he

fell to the ground, defendant struck him in the head at least once more. The medical examiner testified that each of the blows defendant rendered were sufficient to cause death. We therefore conclude beyond a reasonable doubt that defendant inflicted gratuitous violence on Robert.

Regarding Tisha Weaver's murder, the trial court found that her murder was heinous and depraved because she was helpless, her murder was senseless, the only motive for her murder was to eliminate her as a witness, and defendant inflicted gratuitous violence. We agree that the murder was senseless, because Tisha, a 7-year-old child, did not present an obstacle to defendant's goal of taking Robert's guns, and that she was a helpless victim.

We find, however, that the record does not support the trial court's finding that defendant murdered Tisha to eliminate her as a witness. As we stated above, evidence of witness elimination can support a finding of heinousness and depravity. We have held, though, that such evidence must fall into one of three categories: (1) "the murder victim is a witness to some other crime, and is killed to prevent that person from testifying about the other crime"; (2) the defendant has stated that witness elimination was a motive for the murder; or (3) "extraordinary circumstances of the crime show, beyond a reasonable doubt, that witness elimination is a motive." *Ross*, 180 Ariz. at 606, 886 P.2d at 1362; *see also State v. Barreras*, 181 Ariz. 516, 523, 892 P.2d 852, 859 (1995). Moreover, the third category occurs only in the "most extreme" cases. *Ross*, 180 Ariz. at

606, 886 P.2d at 1362 (finding only one example of third category in prior cases).

This case does not fall within the first category because there is no clear evidence of the sequence of the homicides, and we cannot determine conclusively whether Tisha directly witnessed the attack on Ms. Gumina. We leave open the question of whether "some other crime" can include a crime that was committed before the murder at issue but that occurred during the same time period as the murder at issue, such as in a case involving multiple homicides. Additionally, this case does not fall within the second category because review of the record reveals that defendant has not stated that he killed Tisha to eliminate her as a witness. Finally, this case does not fall within the third category because it is not the "extreme" case in which we can conclude beyond a reasonable doubt that witness elimination was the motive for Tisha's murder. Therefore, witness elimination does not support a finding of heinousness and depravity in this case.

The record does support the trial court's finding of gratuitous infliction of violence. The evidence at trial showed that defendant struck Tisha in the head with the baseball bat at least twice and that he then placed a pillow over her head and suffocated her, strangled her, or both. The medical examiner testified that the head injuries were most likely fatal. He also testified that Tisha may have continued breathing for a short period after the head injuries. However, defendant had struck Tisha with the baseball bat with sufficient force to create a wound

several inches wide, extending from her left ear to her left cheek. He then struck her a second time on the back of her head. After delivering these two fatal blows, defendant then asphyxiated her, far exceeding the amount of violence necessary to cause death. We therefore find beyond a reasonable doubt that defendant inflicted gratuitous violence on Tisha.

B. Mitigating Circumstances

In addition to the statutory mitigating circumstances listed in A.R.S. § 13-703(G), the sentencing judge must consider "any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether a sentence less than death might be appropriate." *State v. West*, 176 Ariz. 432, 449, 862 P.2d 192, 209 (1993), *cert. denied*, 511 U.S. 1063, 114 S.Ct. 1635, 128 L.Ed.2d 358 (1994), quoting *State v. McCall*, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983); *see also* A.R.S. § 13-703(G). The defendant must prove the existence of mitigating circumstances by a preponderance of the evidence, and the trial court has the discretion to decide how much weight to give each mitigating circumstance that the defendant offers. *West*, 176 Ariz. at 449, 862 P.2d at 209.

At the sentencing hearing, defendant asserted the following statutory mitigating circumstances: (1) A.R.S. § 13-703(G)(1) (defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired); and (2) A.R.S. § 13-703(G)(2) (defendant was under unusual and substantial duress).

Additionally, defendant raised the following non-statutory mitigating circumstances: (1) victims' family's alleged "indifference" to imposition of the death penalty; (2) chaotic and abusive childhood; (3) potential for rehabilitation; (4) lack of future dangerousness if confined to prison; (5) participation of another individual; (6) history of substance abuse and intoxication at the time of the offenses; (7) head injuries; (8) mental illness; and (9) remorse.

In its special verdicts, the trial court found no statutory mitigating circumstances. The trial court did find that defendant proved the following non-statutory mitigating circumstances by a preponderance of the evidence: (1) defendant suffers from long-term substance abuse; (2) defendant was under the influence of alcohol and drugs at the time of the offenses; (3) defendant had a chaotic and abusive childhood; and (4) defendant has a long standing substance abuse problem which may be caused by genetic factors and aggravated by head trauma. The trial court concluded, however, that the mitigating circumstances did not outweigh the aggravating circumstances and were not sufficiently substantial to call for leniency. As part of our independent review, we address each mitigating circumstance defendant alleged.

1. Statutory Mitigating Circumstance (G)(1)

The trial court considered the evidence presented regarding defendant's mental health and drug use but found he had not proved by a preponderance of the evidence that his capacity to appreciate the

wrongfulness of his conduct or to conform his conduct to the law was significantly impaired. *See* A.R.S. § 13-703(G)(1). Specifically, the trial court found that defendant's conduct during and after the murders, including lying to Russell Dechert so that Dechert would leave the Gumina residence, retrieving his belongings from a friend's house before leaving town, abandoning Katherine Gumina's car, and taking a taxi to Las Vegas, showed that defendant understood the wrongfulness of his acts and attempted to avoid prosecution. Moreover, the trial court noted that the expert testimony regarding defendant's drug use before the murders was based solely on defendant's self-reporting. We agree with the trial court that the evidence of defendant's drug use and related mental health problems supported the finding of a non-statutory mitigating circumstance, as discussed below, but not the (G)(1) circumstance.

2. Statutory Mitigating Circumstance (G)(2)

The trial court also found that defendant did not prove by a preponderance of the evidence that he was "under unusual and substantial duress." A.R.S. § 13-703(G)(2). The only evidence presented at trial to establish this circumstance and the participation of another person in the crimes was defendant's testimony that Frank Sperlazzo was involved with the murders, that Sperlazzo was angry with Robert Weaver because Robert owed him money for drugs, that Sperlazzo was at the Gumina residence on the night of the murders, and that Sperlazzo killed Tisha Weaver. Additionally, although he did not testify, Cordell Reid told the state's investigator that he saw

Frank Sperlazzo near the Gumina residence on the day before and the night of the murders.

This evidence is not sufficient to establish that Sperlazzo participated in the crime and that, as a result, defendant was under substantial duress. The state discredited Reid's story when it determined that Reid could not possibly have seen the Gumina residence from where he claimed to have been. Additionally, the physical evidence presented at trial showed that the three victims were attacked with the same type of blunt instrument, undermining defendant's claim that Sperlazzo killed Tisha Weaver. Therefore, we agree with the trial court that defendant has not established the (G)(2) mitigating circumstance by a preponderance of the evidence.

3. Victims' Family's Alleged "Indifference" to the Imposition of the Death Penalty

Defendant asserts that the victims' family's "indifference" to the imposition of the death penalty should be given weight as a mitigating circumstance. The record does not support defendant's assertion. Although Jackie Weaver was quoted in a newspaper article as stating that she opposed the death penalty in this case, her reasoning was that the death penalty would be "too quick" for defendant. Moreover, Jackie later stated at the sentencing hearing that she did not oppose the death penalty in this case, and her sister stated that she hoped the death penalty would be imposed. *See* *State v. Williams*, 183 Ariz. 368, 385, 904 P.2d 437, 454 (1995) (victim's sister's recommendation of life

sentence not relevant mitigating circumstance because recommendation was out of concern for defendant's family and was unrelated to defendant); *State v. Apelt*, 176 Ariz. 349, 368, 861 P.2d 634, 653 (1993), *cert. denied*, 513 U.S. 834, 115 S.Ct. 113, 130 L.Ed.2d 59 (1994) (request from victim's friend and sister that defendant not be sentenced to death not given mitigating weight). Thus, we do not give this circumstance mitigating weight.[FN3]

> FN3. Although defendant does not claim on appeal that the sentencing recommendations given by Jackie Weaver and her sister were improperly considered as aggravation evidence, we briefly address the issue. We have held that "the trial judge in a capital case is capable of focusing on the relevant sentencing factors and setting aside the irrelevant, inflammatory, and emotional factors." *State v. Williams*, 183 Ariz. at 386, 904 P.2d at 455. Nothing in the record indicates that the trial court gave any aggravating weight to the recommendations when he sentenced defendant; thus, we find no fundamental error.

4. Chaotic and Abusive Childhood

The trial court found that defendant's chaotic and abusive childhood was a mitigating circumstance. A difficult family background is not necessarily a mitigating circumstance unless defendant can show that something in his background had an effect on his behavior that was beyond his control. *See State v.*

Stokley, 182 Ariz. 505, 524, 898 P.2d 454, 473 (1995), *cert. denied*, 516 U.S. 1078, 116 S.Ct. 787, 133 L.Ed.2d 737 (1996). At the sentencing hearing, defendant's stepfather and the court-appointed expert testified that defendant suffered an abusive and chaotic childhood and that the abuse colored his behavior. Defendant's first stepfather was physically and verbally abusive to him, and defendant witnessed his mother being abused. In its special verdict, however, the trial court did not find any connection between defendant's family background and his conduct on the night of the murders, and our review of the record does not reveal any such connection. Thus, we find that defendant's chaotic and abusive childhood is not a mitigating circumstance.

5. Potential for Rehabilitation

The trial court found that defendant did not prove his potential for rehabilitation as a mitigating circumstance. At the sentencing hearing, the court-appointed expert testified that although defendant successfully graduated from continuation school, he left a two-year drug rehabilitation program after 20 months and returned to drug use and was discharged for bad conduct from the Marines. We agree with the trial court that defendant has not established by a preponderance of the evidence that he can be rehabilitated in an institutional setting. *See* *Stokley*, 182 Ariz. at 524, 898 P.2d at 473.

6. Lack of Future Dangerousness if Confined to Prison

Defendant presented some evidence that he would no longer be dangerous if confined to prison for life, but we find that he failed to prove this by a preponderance of the evidence, particularly in light of the violent nature of his offenses. *See* Stokley, 182 Ariz. at 524, 898 P.2d at 473.

7. Participation of Another Individual

The trial court found that defendant did not establish by a preponderance of the evidence that another person participated in the crimes. We agree with the trial court's finding for the reasons set forth in our discussion of the (G)(2) statutory mitigating circumstance.

8. History of Substance Abuse and Intoxication at the Time of the Offenses

The trial court found that defendant had a long-standing substance abuse problem, which may be caused by genetic factors and aggravated by head trauma, and that he was under the influence of alcohol and drugs at the time of the offenses. Although defendant's impairment from voluntary intoxication does not rise to the level of statutory mitigation, we must still consider whether the impairment constitutes a nonstatutory mitigating circumstance, when viewed in light of defendant's alleged history of alcohol and drug abuse. *State v. Murray*, 184 Ariz. 9, 39, 906 P.2d 542, 572 (1995), citing *State v. Gallegos*, 178 Ariz. 1, 17, 870 P.2d 1097, 1113, *cert. denied*, 513 U.S. 934, 115 S.Ct. 330,

130 L.Ed.2d 289 (1994).

Defendant's history of substance abuse is well-documented. Defendant's stepfather testified at the sentencing hearing that by the time defendant was 17 years old, he had used many types of drugs and was an alcoholic and that defendant had attended two drug rehabilitation programs. In contrast, the evidence of defendant's intoxication on the night of the murders comes largely from defendant's self-reporting. At trial, defendant testified that he was under the influence of methamphetamines and alcohol on the night of the murders and that, at the time, he had not slept for 3 or 4 days. Russell Dechert, who saw defendant and Robert Weaver just before the murders, however, testified that, although he knew defendant had been drinking, he was not visibly intoxicated. We give some mitigating weight to this circumstance but find that it is not sufficiently substantial to call for leniency.

9. Head Injuries

The trial court gave some mitigating weight to defendant's head injuries in that it found that the head injuries may have aggravated defendant's substance abuse problem. We have held that "[h]ead injuries that lead to behavioral disorders may be considered a mitigating circumstance." *Stokley*, 182 Ariz. at 521, 898 P.2d at 470.

At the sentencing hearing, defendant's stepfather testified that defendant experienced "black outs" when he was 4 years old due to a calcium deficiency.

that he sustained head injuries when he fell from roofs at ages 13 and 15, and that he was the victim of an assault while enlisted in the Marines. Additionally, Jack Potts, M.D., who prepared defendant's rule 26.5 mental health evaluation, testified that defendant's head injuries should constitute a mitigating factor because they may have caused defendant to act more aggressively on the night of the murders. We agree with the trial court that the head trauma that defendant suffered as a child is a mitigating circumstance, but we also agree with the trial court's conclusion that this mitigation is not sufficient to call for leniency.

In connection with this issue, defendant argues that the trial court should have continued the sentencing hearing so that Dr. Potts could conduct further testing to determine the extent of defendant's head injuries. The decision whether to grant a continuance is within the trial court's discretion, and the trial court may deny a continuance where the defendant seeks to introduce evidence already before the court. *State v. Ohta*, 114 Ariz. 489, 491-92, 562 P.2d 369, 371-72 (1977).

Before the sentencing hearing, Dr. Potts examined defendant twice. Dr. Potts, however, testified at the sentencing hearing that he did not learn of the black outs defendant experienced when he was 4 years old or of the head injury that defendant sustained when he was 15 years old until defendant's stepfather testified at the aggravation/mitigation hearing. Although Dr. Potts testified that additional neurological testing would be helpful to determine

the extent and impact of defendant's head injuries and to determine whether defendant suffers from an organic neurological disorder, he also testified that the new information would not substantially change his opinion. Because the additional testing in all likelihood merely would have corroborated Dr. Potts' testimony, we conclude that the trial court acted within its discretion when it declined to grant a continuance. *But cf. State v. Eastlack*, 180 Ariz. 243, 263-65, 883 P.2d 999, 1019-21 (1994), *cert. denied*, 514 U.S. 1118, 115 S.Ct. 1978, 131 L.Ed.2d 866 (1995) (case remanded for resentencing because defendant had not received any psychological evaluation).

10. Mental Illness

Defendant presented some evidence at the sentencing hearing that he may suffer from cyclothymia, a form of mental illness. Defendant did not, however, establish a causal connection between his alleged mental illness and his conduct on the night of the murders, nor did he provide any documented instances of his alleged illness. Thus, defendant has not established mental illness by a preponderance of the evidence, and we do not give it mitigating weight. *See State v. Stuard*, 176 Ariz. 589, 608 n. 12, 863 P.2d 881, 900 n. 12 (1993) ("[E]vidence of causation is required before mental impairment can be considered a significant mitigating factor."). *Cf. Stokley*, 182 Ariz. at 524, 898 P.2d at 473 (nonstatutory mitigating weight given where defendant had documented mental disorders).

11. Remorse

We agree with the trial court's finding that defendant failed to prove remorse by a preponderance of the evidence. *See* *Stokley*, 182 Ariz. at 525, 898 P.2d at 474. Although Dr. Potts testified that defendant was genuinely remorseful about murdering Robert Weaver and attempting to murder Katherine Gumina, he has not accepted responsibility for Tisha Weaver's death.

C. Independent Review

Defendant argues that the trial court improperly weighed the aggravating and mitigating circumstances. In death penalty cases, this court independently reviews any aggravating and mitigating circumstances to determine whether the death penalty was properly imposed. *State v. Gulbrandson*, 184 Ariz. 46, 67, 906 P.2d 579, 600 (1995); A.R.S. § 13-703.01. Accordingly, we have reviewed the entire record, considering and independently weighing all of the aggravating and mitigating evidence presented. *Gulbrandson*, 184 Ariz. at 67, 906 P.2d at 600, citing *State v. Brewer*, 170 Ariz. 486, 500, 826 P.2d 783, 797, *cert. denied*, 506 U.S. 872, 113 S.Ct. 206, 121 L.Ed.2d 147 (1992).

Regarding Robert Weaver's murder, we find the following aggravating circumstances: (1) defendant committed the murder for pecuniary gain; (2) the murder was especially cruel, heinous, or depraved; and (3) defendant was convicted of another homicide that he committed during the commission of the

instant offense. Regarding Tisha Weaver's murder, we find the following aggravating circumstances: (1) defendant committed the murder for pecuniary gain; (2) the murder was especially cruel, heinous, or depraved; (3) defendant was convicted of another homicide that he committed during the commission of the instant offense; and (4) the victim was under 15 years of age. Regarding both murders, we give mitigating weight to defendant's history of substance abuse, intoxication at the time of the offenses, and head injuries, but we find that the mitigating circumstances are insufficiently substantial to call for leniency.

Disposition

We have independently reviewed the record for fundamental error and have found none. *See State v. Kemp*, 185 Ariz. 52, 67 & n. 1, 912 P.2d 1281, 1296 & n. 1 (1996). Accordingly, we affirm defendant's convictions and sentences.

FELDMAN, C.J., ZLAKET, V.C.J., and MOELLER and MARTONE, JJ., concur.

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